TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 226

OLD DEARBORN DISTRIBUTING COMPANY,
APPELLANT,

vs.

SEAGRAM-DISTILLERS CORPORATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

FILED JULY 24, 1936.

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IN CIRCUIT COURT OF COOK COUNTY

IN CHANCERY

No. 35C16726

SEAGRAM-DISTILLERS CORPORATION, a Corporation, Plaintiff,

vs.

OLD DEARBORN DISTRIBUTING Co., a Corporation, Defendant

COMPLAINT

Seagram-Distillers Corporation, a corporation, plaintiff, by Mayer, Meyer, Austrian & Platt, its attorneys, complains against Old Dearborn Distributing Co., a corporation, and says:

1. Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and is, and during all of the times hereinafter mentioned has been licensed to do business in the State of Illinois, and engaged in the business of dealing in and selling alcoholic beverages of standard quality, under the trade-marks, brands and names of the producers thereof.

2. Defendant is a corporation organized and existing under and by virtue of the laws of the State of Illinois and is, and during all of the times hereinafter mentioned, has been engaged in the business of selling alcoholic beverages at retail to the general public at stores operated by it at 208 West Madison Street, 209 South Wabash Avenue and 3202 Lincoln Avenue, all in the City of Chicago, in said State, under the trade names, styles and descriptions of "Old Dearborn Liquor Stores, Inc.," "Old Dearborn Liquor Stores", "Old Dearborn Liquor Store" and under its said corporate name, "Old Dearborn Distributing Co."

3. Plaintiff is and at all times hereinafter mentioned has been engaged throughout the United States and in the State of Illinois in the business of dealing in, selling and distributing, at wholesale, alcoholic beverages of standard quality produced by Joseph E. Seagram & Sons, Ltd., a corporation, Joseph E. Seagram & Sons, Inc., a corpora-

tion, and corporations affiliated with said corporations, under the trade-marks, brands and names of said corporations. Said beverages included and include "Seagram's Ancient Bottle Rye, Seagram's Pedigree de Luxe Rye, Seagram's Bourbon, Seagram's Pedigree de Luxe Bourbon, Seagram's "83", Seagram's "V. O.", Seagram's Five [fol. 3] Crown Blended Whiskey, Seagram's Seven Crown Blended Whiskey, Seagram's King Arthur Distilled Gin, Seagram's Superior Distilled Gin, Kessler's Private Blended Whiskey, and Kessler's Preferred Blended Whiskey. The foregoing brands are sold in various sized bottles, including the following sizes: 4/5 quart, quart, pint and half-pint. Said beverages, which are hereinafter referred to as "Seagram's Whiskies and Gins" and "Kessler's Blended Whiskies", bear trade-marks, brands and names of Joseph E. Seagram & Sons, Ltd., or Joseph E. Seagram & Sons, Inc., or of corporations affiliated with said corporations, which are the respective producers thereof, and each of said beverages is, and during all of the times hereinafter mentioned was, in fair and open competition with commodities of the same general class produced by others and sold and distributed throughout the State of Illinois. Plaintiff has continuously since long prior to the times hereinafter mentioned, sold said "Seagram's Whiskies and Gins" and "Kessler's Blended Whiskies" in the State of Illinois and elsewhere under said trade-marks, brands and names, and for a long time prior to the time of defendant's acts herein complained of and continuously thereafter, plaintiff and the aforesaid corporations producing said beverages have expended large sums of money in advertising the high and standard quality of said beverages and the trade-marks, brands and names under which they are sold as aforesaid in the State of Illinois. Said beverages and each of them, and the trade-marks, brands and names under which they are sold, have become widely and favorably known to the trade and the public generally in the State of Illinois, and the plaintiff has sold large quantities of each of said beverages in the City of Chicago.

4. Plaintiff is, and continuously since long prior to the times hereinafter mentioned, has been the sole person firm or corporation authorized by the producers of said "Seagram's Whiskies and Gins" and "Kessler's Blended Whis-

kies" to regulate and control the sale and distribution of said beverages in the State of Illinois. Plaintiff has not sold and does not sell any of said beverages at retail or at wholesale directly to any retailers in said state, but has confined and continues to confine its sale and distribution of the same to a limited number of wholesale distributors, who in turn have resold and do resell the same at wholesale to retailers. Prior to the time of the first of the defendant's acts complained of hereunder, in order to protect dealers in said beverages and the public within said State of Illinois and the producers of said "Seagram's Whiskies and Gins" and "Kessler's Blended Whiskies" and itself against the injurious and uneconomic practices of price cutting in the distribution of said beverages in said state under said trade-marks, brands and names, plaintiff executed Fair Trade Contracts in accordance with the provisions of the Fair Trade Act of the State of Illinois, with all of its distributors in said state and with large numbers of retailers therein. Defendant under the trade name and style of "Old Dearborn Liquor Stores, Inc." executed in the City of Chicago in said State, one of said Retailer's Fair Trade Contracts with plaintiff on or before October 11, 1935. Said Contract is still in full force and effect, and a copy thereof is attached hereto as Exhibit 1 and made a part hereof. Prior to the time of the defendant's conduct complained of herein, and continuously ever since, the plaintiff has sold all of said beverages distributed by it in the State of Illinois subject to the terms and provisions of said Fair Trade Contracts.

[fol. 4] 5. Under the terms and provisions of said Fair Trade Contracts with said distributors and retailers, including that with the defendant, it is provided that said beverages shall not be sold, advertised or offered for sale within the State of Illinois below the minimum prices stipulated from time to time by plaintiff in written schedules thereof furnished to said distributors and retailers. A form of said contract made with distributors is attached hereto as Exhibit 2 and is made a part hereof.

6. Pursuant to and in accordance with said Fair Trade Contracts and prior to the acts of the defendant complained of herein, plaintiff announced and made known generally to the trade throughout the State of Illinois by the wide-

spread mailing of written schedules and otherwise, the minimum prices at which said beverages were and are to be sold at wholesale to retailers and at retail to consumers in said state. Prior to the time of the first act of the defendant complained of hereunder, defendant received a schedule of such minimum prices, which prices are the same as those continuously in effect since August 26, 1935, and up to and at the present time. A copy of said schedule and a copy of a written communication accompanying the same, received by defendant, are hereto attached and made a part hereof as Exhibits 3 and 4.

7. Defendant, notwithstanding its promises in said Fair Trade Contract entered into with plaintiff, and notwithstanding plaintiff's insistence that defendant comply therewith, did at the places and times hereinafter mentioned, wilfully and knowingly advertise, offer for sale and sell at retail in the State of Illinois certain of said "Seagram's Whiskies and Gins" in bottles or containers bearing the trade-mark, brand or name of the producers thereof at less than the prices stipulated by plaintiff for their resale at retail;

(a) On November 13, 1935, in the store operated by defendant at 3202 Lincoln Avenue, Chicago, Illinois, defendant advertised and offered for sale to the public by affixing price tickets displaying prices less than said minimum prices stipulated by the plaintiff, as hereinafter indicated, upon the following of said brands:

Brand	Sizes	Plaintiff's Stipulated Resale Prices	Defendant's Cut Prices
Seagram's Five Crown Blended Whiskey	Pints	$1.35	$0.99
Seagram's Seven Crown Blended Whiskey	Pints	1.59	1.29
Seagram's Seven Crown Blended Whiskey	Quarts	3.10	2.58
Seagram's Five Crown Blended Whiskey	Quarts	2.59	1.98
Seagram's Seven Crown Blended Whiskey	Half Pints	.85	.75
Seagram's Five Crown Blended Whiskey	Half Pints	.69	.59
Seagram's V. O.	Pints	2.47	2.39
Seagram's V. O.	Quarts	4.79	3.69

(b) On November 15th and 16th, 1935, defendant wilfully and knowingly further violated its said Fair Trade [fol. 5] Contract with plaintiff at the store operated by

defendant at 208 West Madison Street, in said City of Chicago, by advertising, offering for sale and selling the following of said beverages at prices below said minimum resale prices stipulated by plaintiff as hereinafter indicated:

Brand	Sizes	Plaintiff's Stipulated Resale Prices	Defendant's Cut Prices
Seagram's V. O.	Pints	$2.47	$2.09
Seagram's Ancient Bottle Rye	Pints	2.49	2.29

As one of the means, among others, adopted by the defendant to further its sale of said brands at said cut prices, and to induce the public to purchase the same, the defendant affixed to its window at its said store a poster conspicuously displaying such cut prices, a photograph of which poster as so displayed is attached hereto as Exhibit 5 and made a part hereof.

(c) On November 15th and 16th, 1935, defendant further wilfully and knowingly violated its said Fair Trade Contract with plaintiff at the store operated by defendant at 209 South Wabash Avenue in said City of Chicago, by advertising and offering for sale said Seagram's V. O. in pints at the cut price of $2.09 each and said Seagram's Ancient Bottle Rye pints at the cut price of $2.29 each, and, as one of the means, among others, adopted by the defendant to further its sale of said two brands at said cut prices and to induce the public to purchase the same, the defendant affixed to its window at its said store a poster conspicuously displaying such cut prices, a photograph of which poster as so displayed is attached hereto as Exhibit 6 and made a part hereof.

(8) Following the aforesaid wilful violations by defendant of said Fair Trade Contract and on November 16, 1935, plaintiff demanded of the defendant that it discontinue advertising, offering for sale or selling any of said "Seagram's Whiskies and Gins" and "Kessler's Blended Whiskies" below the minimum price stipulated by the plaintiff from time to time in accordance with said Fair Trade Contract; that defendant, notwithstanding plaintiff's demand and insistence that defendant comply with its promises contained in said Fair Trade Contract, refused to discontinue advertising, offering for sale and selling said bever-

ages at less than the prices stipulated by plaintiff, and advised plaintiff that the defendant would not comply with its promises contained in said Fair Trade Contract and that defendant proposed to continue to violate the same and to sell said beverages at prices below the minimum prices stipulated by the plaintiff from time to time and at such resale prices as defendant desired to fix from time to time for the resale of the same; that defendant has, in accordance with its threats so to do, continued to violate said Fair Trade Contract, by advertising, offering for sale and selling certain of said beverages at prices below the said minimum prices stipulated by the plaintiff and continues so to do to the irreparable injury and damage to plaintiff's good will and business, to said "Seagram's Whiskies and Gins" and to the good will and business of the producers thereof, and the trade-marks, brands, and names under which said beverages are sold.

(9) Defendant's conduct has caused and is continuing to cause plaintiff irreparable damage and unless defendant is immediately enjoined and restrained from continuing [fol. 6] such conduct the plaintiff will suffer further irreparable damage in that such wrongful conduct of the defendant will result in a decreased demand for such beverages and in a decrease in plaintiff's sales, and will cause others dealing in beverages bearing the same trade-marks, brands or names to breach plaintiff's Fair Trade Contracts thereby disorganizing the distribution of said beverages by plaintiff, and will continue to irreparably damage and injure the good will of the plaintiff and the good will and trade-marks, brands and names of the producers of said beverages, all to the great damage and financial loss of the plaintiff and to its irreparable injury.

Inasmuch as plaintiff is without an adequate remedy at law and because of the statute in such case made and provided plaintiff Prays that the said defendant and its officers, agents, servants, employees and each and every of them may be, during the pendency of this suit, temporarily enjoined and restrained by this Honorable Court and in the final decree entered herein forever enjoined and restrained by the court from advertising, offering for sale or selling said Seagram's Ancient Bottle Rye, Seagram's Pedigree De Luxe Rye, Seagram's Bourbon, Seagram's Pedigree

De Luxe Bourbon, Seagram's "83", Seagram's "V. O.", Seagram's Five Crown Blended Whiskey, Seagram's Seven Crown Blended Whiskey, Seagram's King Arthur Distilled Gin, Seagram's Superior Distilled Gin, Kessler's Private Blended Whiskey, and Kessler's Preferred Blended Whiskey, or any of them at less than the prices stipulated by plaintiff from time to time in accordance with the terms and provisions of plaintiff's Fair Trade Contracts with Distributors and Retailers in the State of Illinois, and that plaintiff may have such other and further relief as to the court shall seem just.

Seagram-Distillers Corporation, by Mayer, Meyer, Austrian & Platt, Its Attorneys. Mayer, Meyer, Austrian & Platt and Otto Kerner, Jr., Attorneys for Plaintiff.

Duly sworn to by Clarence G. McQuaide. Jurat omitted in printing.

[fol. 7] IN CIRCUIT COURT OF COOK COUNTY

[Title omitted]

ANSWER

The defendant for answer to the complaint of the plaintiff herein by Attorneys Irving Breakstone and Irving Greenspahn, says:

1. That it has not sufficient information to form a belief as to the truth of the allegations contained in paragraph numbered one of the complaint herein, and therefore denies the same and demands strict proof thereof.

2. Defendant admits the allegations of paragraph two of the said complaint save and except that it denies that it, the said defendant, did business under any trade name, styles and descriptions such as set forth in said paragraph numbered two of the complaint herein or any other trade names, styles and descriptions other than its proper corporate business name as contained in its charter.

3. Further answering the said complaint defendant states that it has not sufficient information upon which to form a belief as to the allegations contained in paragraph

three of the complaint herein and therefore denies the same.

[fol. 8] 4. Defendant denies the execution of the alleged contract set forth in paragraph numbered four of the complaint and states that the said contract is not the contract of the defendant but is as it purports to be, the contract of a corporation or party or person other than the defendant herein. Further answering said paragraph numbered four of the complaint herein, defendant says that it has not sufficient information upon which to form a belief as to the truth of the remaining allegations thereof and therefore denies the same.

5. Further answering said complaint defendant says it has not sufficient information to form a belief as to the truth of the allegations contained in paragraph numbered five of the said complaint and therefore denies the same.

6. Defendant denies the allegations of paragraph numbered six of the said complaint to the effect that it received a schedule of certain alleged minimum prices of the plaintiff continuously in effect since August 26, 1935, and up to and at the present time. Defendant denies that it received a copy of the said schedule and a copy of a written communication accompanying the same mentioned in paragraph numbered six of the said complaint and therein referred to as plaintiff's Exhibits Three and Four, by mail or otherwise and says that the first copies thereof it had ever received were those attached to and made a part of the copy of the complaint in this cause when the same was served upon the defendant herein. Further answering the said paragraph numbered six of the complaint herein defendant says it has not sufficient information to form a belief as to the truth of the remaining allegations contained in said paragraph numbrered six and therefore denies the same.

7. Defendant states that it did on the dates mentioned in paragraph numbered seven, sell the merchandise of the description set forth therein at the schedule of prices as [fol. 9] stated in paragraph seven of the complaint, at the stores located as described therein. Defendant states that it had no knowledge of any stipulated resale prices of the plaintiff as set forth therein. Defendant states that all merchandise sold by it as set forth in said paragraph num-

bered seven of the said complaint were sold at a profit to the defendant herein. Defendant admits the advertisements and posters set forth in this paragraph of the complaint and incorporated therein as Exhibits Five and Six. Further answering this paragraph of the complaint defendant states that at no time did it authorize any officers, agents, servants or employees to enter into any contracts of whatsoever name, nature or description as those set forth in the complaint herein and as described in paragraph numbered four and incorporated therein as Exhibit One and in the alternative in the event the said contract should be by the Court held to be the bona fide contract of the defendant and that the signature thereto is binding upon the defendant and its signature, that then the said contract in addition to being unauthorized and executed without authority is ultra vires and without the powers of the defendant corporation by its charter and the laws of the State of Illinois to enter into and perform.

8. Defendant in answer to the allegations contained in paragraph numbered eight of the complaint states that it acquired the merchandise in question by purchase from other firms and corporations than the plaintiff and that it had no contractual relations of whatsoever name, nature or description with the plaintiff in reference to the merchandise sold at the times and places in question as set forth in the complaint herein and that the said merchandise was purchased by the defendant at prices below the minimum schedule of prices for the sale of plaintiff's products by its distributors and retailers as set forth in the complaint herein.

9. Defendant denies the allegations contained in paragraph numbered nine of the said complaint and further [fol. 10] alleges in the alternative as to the allegations thereof Damnum Absque Injuria.

10. Defendant says that it owes no duty unto the plaintiff upon which to premise any order compelling defendant to charge prices for its merchandise by it owned and as described in the complaint herein arbitrarily imposed upon the said defendant by the plaintiff through the alleged contract as set forth in the complaint herein.

11. Defendant states that Sections VIII to XI inclusive of Chapter 140, Illinois Revised Statutes, 1935, upon which

plaintiff's purported cause of action is based, and upon which the validity of its purported contract is premised, is unconstitutional and void because:

(a) They violate the provisions of Section 2 of Article II of the Constitution of Illinois.

(b) They violate the provisions of the Fifth Amendment and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

and that the alleged contract referred to in the complaint as Exhibit One is invalid and unenforceable because:

(a) The said contracts violate the criminal law of Illinois in regard to pools, trusts and combinations.

(b) They violate the public policy of Illinois.

(c) They violate the common law of Illinois.

(d) They violate the provisions of Section 2 of Article II of the Constitution of Illinois.

(e) They violate the provisions of the Fifth Amendment and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

(f) That in the alternative if the said contract set forth in the complaint as Exhibit One is the contract of the defendant the same is void because it is executed without consideration, because it is unilateral and lacks mutuality and therefore void.

12. Defendant states that the Court does not have the power or jurisdiction to fix minimum prices for the defendant's merchandise and that stifles and prevents com- [fol. ..] petition, and that the purported contracts employed by the plaintiff and as described in the complaint herein or any order or decree that fixes prices and stifles competition, is without authority and contrary to the laws of the State of Illinois.

13. Defendant states that the complaint does not state a cause of action sufficient to justify the entry of an injunctional order and the other relief prayed for in said complaint.

14. Defendant states that the acts and doings of the plaintiff as disclosed by the complaint, show that in relation to

the subject matter of the litigation, the plaintiff is guilty of unconscionable and illegal conduct and do- not come into a Court of equity with clean hands and therefore should be denied relief of any kind.

15. Defendant states that the attempt of the plaintiff to fix prices for its merchandise and to stifle and prevent competition in the sale thereof by the contracts and devices set forth in the complaint herein is a fraud upon the public in that the aforementioned acts of the plaintiff prevents competition, restricts freedom of action in trade or commerce and are hostile to the public welfare and are not consonant with the spirit of our established institutions and are in violation of law.

16. Defendant states that it has conducted its stores for several years; that it sells its merchandise for cash only and enjoys a good will and a sales volume of many thousands of dollars per annum. That Sections VIII to XI inclusive of Chapter 140 of Illinois Revised Statutes, 1935, is an unconstitutional delegation of legislative power to private persons and in violation of Article III of the Constitution of the State of Illinois.

17. Further answering said complaint defendant states that it is informed and believes that many retailers of merchandise of the description contained in the complaint, and [fol. 12] competitors of the defendant have not entered into contracts with the plaintiff of the nature of those set forth in the complaint and that they sell the said merchandise below the minimum prices proclaimed by the plaintiff as described in its complaint; that certain of said retailers and competitors are favored over another and that defendant, in the regular course of its business, sells its merchandise at such prices as to attract customers and that its use of the merchandise in question is not destructive of competitors any more than are other forms of advertising that attract public attention.

18. Defendant states that it is informed and believes and therefore states the fact to be that the plaintiff in combination and concert with a number of other corporations, firms and individuals not seeking a fair and reasonable price for the sale of merchandise are aiming to eliminate fair competition so that the plaintiff and its aids and co-conspira-

tors can gouge the public by high prices and obtain tremendous profits; that upon information and belief much of the merchandise, the resale prices of which are sought to be controlled by the devices and in the manner as set forth in the complaint herein, are articles in interstate commerce and said contracts are in violation of the Anti-Trust laws of the United States and are a burden upon interstate commerce.

Wherefore defendant demands judgment dismissing the complaint, herein, and for its costs and disbursements and that the relief prayed for by the plaintiff herein be denied.

Old Dearborn Distributing Company, a Corporation, by Irving Breakstone and Irving Greenspahn, Its Attorneys.

Irving Breakstone, 140 N. Dearborn St., State 2922, and Irving Greenspahn, 139 North Clark St., Randolph 3560, Attorneys for Defendant.

[fol. 13] *Duly sworn to by Howard Blum. Jurat omitted in printing.*

[fol. 14] IN CIRCUIT COURT OF COOK COUNTY

[Title omitted]

REPLY

Plaintiff, by Mayer Meyer Austrian & Platt, its attorneys, for its reply to the answer of the defendant herein, says:

(1) That it is without knowledge of the allegations contained in paragraph (7) of said answer wherein it is alleged that "Defendant states that all merchandise sold by it set forth in said paragraph numbered (7) of said complaint, were sold at a profit to defendant herein", and Plaintiff denies that said contract was unauthorized, executed without authority or ultra vires and without the powers of the defendant corporation.

(2) It denies the allegations contained in paragraphs (10) to (15) inclusive, of said answer.

(3) It is without knowledge of the allegations contained in the first sentence of paragraph (16) of said answer and denies the allegations contained in the second sentence of said paragraph.

[fol. 15] (4) Without admitting the allegations contained in paragraph (17) of said answer it states that they are wholly irrelevant and immaterial to any issue in the case.

(5) It denies the allegations contained in paragraph (18) of said answer.

Seagram-Distillers Corporation, By Mayer Meyer Austrian & Platt, Otto Kerner, Jr., Its Attorneys.

Mayer, Meyer, Austrian & Platt, Otto Kerner, Jr., Attorneys for said Plaintiff.

Duly sworn to by Clarence G. McQuaide. Jurat omitted in printing.

[fol. 16] In Circuit Court of Cook County

In Chancery

No. 35C-16726

Seagram-Distillers Corporation, a Corporation, Plaintiff,

vs.

Old Dearborn Distributing Co., a Corporation, Defendant

Decree—November 30, 1935

This cause coming on to be heard for final hearing upon the verified complaint of plaintiff Seagram-Distillers Corporation, a corporation, filed herein November 19, 1935, the verified answer of Old Dearborn Distributing Co., a corporation, the defendant herein, filed herein November 21, 1935, and upon the verified reply of said Seagram-Distillers Corporation filed herein November 22, 1935 and said plaintiff, being now here represented in open court by Mayer, Meyer, Austrian & Platt and Otto Kerner, Jr., its attorneys, and said defendant being now here represented in open court by Irving Breakstone, and Irving Greenspahn, its attorneys, and the court having heard in open court the

evidence, both oral and documentary, offered and introduced on said hearing by both parties hereto, and also the arguments of counsel of both said parties and having now fully considered the same, and being now full- advised in the premises, Doth Find:

[fol. 17] 1. That the court has jurisdiction of all the parties hereto, and of the subject matter of this suit;

2. That the plaintiff has in all matters and things proceeded in this cause in accordance with law, and that all the material allegations of its complaint have been fully proven to be true, and that none of the alleged defenses set forth in said answer has been proven;

3. That the equities of this cause are with the plaintiff, and that the plaintiff is entitled to the relief prayed for in its complaint.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that Old Dearborn Distributing Co., the defendant, and its officers, agents, servants, employees, successors and assigns, and each and every of them, be and they and each of them hereby are forever enjoined and restrained by the court from wilfully and knowingly advertising, offering for sale or selling Seagram's Ancient Bottle Rye, Seagram's Pedigree De Luxe Rye, Seagram's Bourbon, Seagram's Pedigree De Luxe Bourbon, Seagram's "83", Seagram's "V.O.", Seagram's Five Crown Blended Whiskey, Seagram's Seven Crown Blended Whiskey, Seagram's King Arthur Distilled Gin, Seagram's Superior Distilled Gin, Kessler's Private Blended Whiskey, and Kessler's Preferred Blended Whiskey, or any of them, in the City of Chicago or elsewhere in the State of Illinois, at less than the prices stipulated by Seagram-Distillers Corporation, a corporation, plaintiff herein, from time to time under the "Fair Trade Act" of the State of Illinois, in accordance [fols. 18 & 19] with the terms and provisions of contracts made pursuant to said "Fair Trade Act" between plaintiff and its Distributors or between plaintiff and Retailers, which contracts, at the time of the filing of the complaint herein were, or now are or may hereafter be in force in Illinois relating to the sale or resale of any of said beverages in the State of Illinois.

Enter:

George Fred Rush, Judge.

[fol. 20] [File endorsement omitted]

[fols. 20-1–20-5] In Supreme Court of Illinois, April Term, A. D. 1936

Seagram-Distillers Corporation, a Corporation, Plaintiff (Appellee),

vs.

Old Dearborn Distributing Co., a Corporation, Defendant (Appellant)

Appeal from Circuit Court, Cook County

Honorable George Fred Rush, Judge Presiding

Abstract of Record—Filed January 30, 1936

Placita.
Verified complaint filed November 19, 1935.

[fol. 20-6] Exhibit 1 to Complaint

Fair Trade Contract

Seagram-Distillers Corporation

Th-s Agreement, made this 14th day of August, 1935, between Seagram-Distillers Corporation, a corporation with an office and place of business at 20 North Wacker Drive, Chicago, Ill. (hereinafter called "Owner"), and Old Dearborn Liquor Stores, Inc. of Chicago (hereinafter called "Retailer"),

Witnesseth:

Whereas, the Owner is engaged in the business of distributing alcoholic beverages in the State of Illinois produced by Joseph E. Seagram & Sons., Ltd., Joseph E. Seagram & Sons, Inc., and affiliated corporations, which bever-[fol. 20-7] age bears trademarks, brands and names of said corporations, and affiliated corporations, and

Whereas, said beverages are in fair and open competition with commodities of the same general class produced by others, and

Whereas, Owner has entered into contracts with Distributors, whereby said Distributors have agreed not to sell

within the State of Illinois any of said beverages to any Retailer in Illinois, unless and until said Retailer shall have executed a contract similar to this contract, and.

Whereas, it is the desire of the parties hereto to fix the resale prices of said beverages, both at wholesale and at retail, within the limits of the Fair Trade Act of Illinois for the purpose of insuring a fair return to those engaged in the sale thereof,

Now, therefore, the parties hereto agree as follows:

First. Retailer will not sell, advertise, or offer for sale within the State of Illinois any beverages for which the Owner is distributor and which bear trademarks, brands and names of Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc., or affiliated corporations, which the Retailer has purchased, or now has on hand, or which Retailer may hereafter purchase, below the minimum prices stipulated from time to time by Owner for sale to Consumers, nor will he make any refunds, discounts, or concessions of any kind or character for the purpose of, or which will result in decreasing the said stipulated minimum prices, nor sell or offer to sell any of such beverages in combination with any other beverages at a single or joint price.

Second. In the event (a) of closing out the Retailer's stock for the purpose of discontinuing delivering any such beverages or, (b) that any of said beverages in Retailer's hands are damaged or deteriorated in quality, or (c) that Retailer has on hand any of said beverages after this agreement has been terminated, for any reason, Retailer shall, before offering any of said beverages for sale at prices less than the minimum resale prices fixed therefor, first offer to return such beverages to the Owner against payment therefor of an amount equal to the cost price thereof to Retailer.

[fol. 20-8] Third. The minimum sales prices of such beverages by Retailer to Consumers will be in accordance with written schedules thereof, furnished from time to time to Retailer by Owner, or distributor of Owner, which schedules are to be considered a part of this contract. The schedule last delivered to Retailer shall govern the resale price to consumer. Owner reserves the right to change the schedule of prices from time to time upon ten (10) days' written notice to Retailer.

Fourth. Inasmuch as it would be impracticable or extremely difficult to fix the damage which may be sustained by Owner by reason of a breach of this contract by Retailer, it is agreed that the Retailer shall pay to the Owner, as liquidated damages, the sum of Fifty ($50.00) Dollars for each breach of this contract, plus the amount by which the stipulated minimum resale price exceeds the price at which any of said beverages are sold. It is further agreed that the Owner, in addition to all other legal rights and remedies, shall be entitled to injunctive relief against any and all breaches of this agreement by the Retailer.

Fifth. This contract is made in pursuance of and by authority of the Fair Trade Act of the State of Illinois and known as Senate Bill 598 enacted at 59th General Assembly, must be executed in the State of Illinois by both parties hereto, and shall apply only to the sales made within the State of Illinois of beverages located therein.

In witness whereof, the parties hereto have caused this contract to be executed the day and year first above mentioned. This agreement subject to cancellation upon (30) Thirty Days notice in writing by either party.

Seagram-Distillers Corporation, by C. C. McQuaide.
Old Dearborn Liquor Stores, Inc., by Sa[illegible] I. Greenspahn, Secy. & Treas.

[fol. 20-9] EXHIBIT 2 TO COMPLAINT

Fair Trade Contract

Seagram-Distillers Corporation

This Agreement, made this — day of ——, 193-, between Seagram-Distillers Corporation, a corporation with an office and place of business at 20 North Wacker Drive, Chicago, Ill. (hereinafter called "Owner"), and —— —— of —— Chicago (hereinafter called "Distributor"),

Witnesseth:

Whereas, the Owner is engaged in the business of dealing in alcoholic beverages in the State of Illinois produced

by Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc., and affiliated corporations, which beverages bear trade-marks, brands and names of said corporations and affiliated corporations, and

Whereas, said beverages are in fair and open competition with commodities of the same general class produced by others, and

Whereas, it is the desire of the parties hereto to fix the resale prices of said beverages, both at wholesale and at retail, within the limits of the Fair Trade Act of Illinois, for the purpose of insuring a fair return to those engaged in the sale thereof,

Now, therefore, the parties hereto agree as follows:

First. Distributor will not sell, advertise, or offer for sale within the State of Illinois any beverages which the Owner is handling and which bear trade-marks, brands and names of Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc., or affiliated corporations, which the Distributor has purchased, or now has on hand, or which Distributor may hereafter purchase, below the minimum prices stipulated from time to time by Owner for sales to Retailers, nor will he make any refunds, discounts, or concessions of any kind or character for the purpose of, or which will result in decreasing the said stipulated minimum prices, nor sell or offer to sell any of such beverages in com- [fol. 20-10] bination with any other beverage at a single or joint price.

Second. In the event (a) of closing out the Distributor's stock for the purpose of discontinuing delivering any such beverages or, (b) that any of said beverages in Distributor's hands are damaged or deteriorated in quality, or (c) that Distributor has on hand any of said beverages after this agreement has been terminated, for any reason, Distributor shall, before offering any of said beverages for sale at prices less than the minimum resale prices fixed therefor, first offer to return such beverages to the Owner against payment therefor of an amount equal to the cost price thereof to Distributor, which offer to return such beverages to the Owner shall be made ten (10) days before such beverages shall be offered for sale at prices less than the minimum resale prices fixed for such beverages.

Third. Distributor will require from each Retailer to whom he may sell any such beverages a written agreement,

upon forms furnished by Owner, that such Retailer in turn will not resell, advertise or offer for sale the said beverages below minimum prices stipulated from time to time by Owner for resale thereof to Consumers.

Fourth. The minimum resale prices of said beverages by (a) Distributor to Retailer, and (b) by Retailer to Consumer, shall be in accordance with respective written schedules thereof furnished from time to time by Owner to Distributor, which schedules are to be considered a part of this contract. The schedule last delivered by Owner to Distributor shall govern the resale price at the time each particular resale is made and Distributor shall deliver promptly to all Retailers to whom he may sell said beverages schedules covering resale prices from Retailer to Consumer, which from time to time may be in force. Owner reserves the right to change the schedule of prices from time to time upon ten (10) days' written notice to Distributor.

Fifth. Distributor agrees that the Owner or its authorized representative shall have the right, from time to time, to make examinations of the books and records of the Distributor, for the purpose of ascertaining whether there has [fol. 20-11] been any violation or violations of the terms of this agreement, at such time or times as the Owner shall in its discretion decide.

Sixth. Distributor shall pay and discharge all costs, expenses and attorney fees which shall be incurred, or expended, by the Owner, in enforcing the terms and covenants of this agreement, whether by the institution of litigation or in taking advice of counsel or otherwise. In the event of a breach of this contract by the Distributor, it is agreed that it would be extremely difficult or impractical to fix the damages which may be sustained by the Owner by reason thereof, and the Distributor therefore agrees to pay to the Owner, as liquidated damages, the sum of Fifty ($50.00) Dollars for each breach of this contract, plus the amount by which the stipulated minimum resale price exceeds the price at which any of said beverages are sold. For the purpose of facilitating the payment of all costs, expenses and attorney's fees incurred in enforcing the terms and covenants of this agreement and the payment of any damages which may be sustained by reason of the breach of any of the covenants of this agreement, as herein pro-

vided, the Distributor hereby agrees to deposit with the Owner the sum of — Dollars, from which the Owner shall be authorized to recompense itself for all costs, expenses, attorney's fees and damages as herein provided arising by reason of any breach or breaches of this agreement. In the event the Distributor shall not violate any of the terms or covenants of this agreement, the Owner agrees to return the amount of money deposited by the Distributor hereunder, upon the termination of this agreement. In the event of any violation of any of the terms or covenants of this agreement, the Owner shall have the right to forthwith cancel the license of the Distributor to sell or distribute any of the products handled by the Owner. It is further agreed that the Owner, in addition to all other legal rights and remedies, shall be entitled to injunctive relief against any and all breaches of this agreement by the Distributor.

Seventh. This contract shall remain in full force and ef-
[fol. 20-12] fect for a period of one (1) year and thereafter until either party hereto shall cancel the same by giving to the other party sixty (60) days written notice to that effect by Registered Mail.

Eighth. This contract is made in pursuance of and by authority of the Fair Trade Act of the State of Illinois and shall apply only to the sales made within the State of Illinois pursuant hereto or to any agreement executed as provided in Paragraph Third hereof, of beverages located therein.

In witness whereof, the parties hereto have caused this contract to be executed the day and year first above mentioned.

Seagram-Distillers Corporation, by —— ——,
Owner. by —— ——, Distributor.

EXHIBIT 3 TO COMPLAINT

Seagram-Distillers Corporation,

20 North Wacker Drive, Chicago, Ill.

Distillers Since 1857

November Fifth, 1935.

DEAR SIR:

We are enclosing a schedule of minimum prices for the resale of Seagram and Kessler brands. This schedule has been issued pursuant to, and is a part of, the Fair Trade Contracts which we have entered into under the Illinois Fair Trade Act with Distributors and Retailers in Illinois.

As you are aware, these Fair Trade Contracts provide that our Seagram's Whiskeys and Gins and our Kessler's Blended Wiskeys shall not be sold, advertised or offered for sale within the State of Illinois below the minimum prices stipulated by us from time to time.

Section 2 of the Illinois Fair Trade Act reads as follows:

"Wilfully and knowingly advertising, offering for sale [fols. 20-13 & 20-14] or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

We wish you continued success in the distribution of Seagram and Kessler products.

Very truly yours, Seagram-Distillers Corporation.

[fols. 20-15 & 20-16]

EXHIBIT 4 TO COMPLAINT

Schedule of Retailers Cost and Selling Prices

Seagram's Whiskies and Gins

Illinois, October 29, 1935.

(This price list supersedes all previous Illinois price lists and is effective October 29, 1935)

(This schedule is issued pursuant to and is a part of Seagram-Distillers Corporation's Fair Trade Contracts with Distributors and Retailers in Illinois)

Brand	Quantity	4/5 Qts., 25.6 Oz. Cost to Retailer 12 Fifths	4/5 Qts., 25.6 Oz. Price per Bottle to Consumer	Quarts, 32 Oz. Cost to Retailer 12 Qts.	Quarts, 32 Oz. Price per Bottle to Consumer	Pints, 16 Oz. Cost to Retailer 24 Pints	Pints, 16 Oz. Price per Bottle to Consumer	Half Pints, 8 Oz. Cost to Retailer 48 ½ Pts.	Half Pints, 8 Oz. Price per Bottle to Consumer	1/10 Pts., 1.5 Oz. Cost to Retailer 120 Min.	1/10 Pts., 1.5 Oz. Price per Bottle to Consumer
Heavy Bodied American Type –BOTTLED IN BOND RYE WHISKEY: Seagram's Ancient Bottle Rye Age 5 Yrs.—100 Proof	Cases										
	1 to 4	$36.72	$3.89	$45.83	$4.87	$47.00	$2.49	$47.87	$1.27	$25.54	$0.27
	5 or more	34.94		43.62		44.72		45.55		24.30	
Seagram's Pedigree DeLuxe Rye Age 8 Yrs.—100 Proof	1 to 4	.....		$54.00	$5.74	$55.17	$2.93	.....		$29.64	$0.31
	5 or more	.....		51.37		52.49		.....		28.17	
Heavy Bodied American Type BOTTLED IN BOND BOURBON WHISKEY: Seagram's Bourbon Age 5 Yrs.—100 Proof	1 to 4	$35.79	$3.79	$44.67	$4.74	$45.83	$2.43	$46.71	$1.24	$24.96	$0.27
	5 or more	34.06		42.51		43.61		44.45		23.75	
Seagram's Pedigree DeLuxe Bourbon Age 8 Yrs.—100 Proof	1 to 4	.....		$54.00	$5.74	$55.17	$2.93	.....		$29.64	$0.31
	5 or more	.....		51.37		52.49		.....		28.17	
BOTTLED IN BOND CANADIAN WHISKEY: BOTTLED IN BOND Seagram's "83" Age 5 Yrs.—90 Proof	1 to 4	$34.27	$3.64	$42.91	$4.55	$44.08	$2.34	$44.96	$1.19	$24.08	$0.26
	5 or more	32.62		40.84		41.95		43.02		22.91	
Seagram's "V.O." Age 6 Yrs.—90 Proof	1 to 4	$36.26	$3.85	$45.25	$4.79	$46.41	$2.47	$47.29	$1.25	$25.25	$0.27
	5 or more	34.51		43.07		44.16		45.00		24.02	
BLENDED WHISKEY: Seagram's 5 Crown 90 Proof	1 to 4	$19.40	$2.15	$23.60	$2.59	$24.25	$1.35	$25.15	$0.69	$14.30	$0.16
	5 or more	18.49		22.50		23.11		23.97		13.62	
Seagram's 7 Crown 90 Proof	1 to 4	$23.15	$2.59	$28.20	$3.10	$28.85	$1.59	$29.75	$0.85	$16.60	$0.19
	5 or more	22.05		26.86		27.48		28.34		15.81	
Seagram's Crown Special 90 Proof	1 to 4	.....		$23.60	For Bar Use Only	.....		.....		.....	
	5 or more	.....		22.50		.....		.....		.....	
LONDON DRY DISTILLED GIN: Seagram's King Arthur 90 Proof	1 to 4	$10.75	$1.15	$13.15	$1.45	$13.85	$0.75	$14.82	$0.39	$ 9.15	$0.10
	5 or more	10.27		12.57		13.23		14.15		8.73	
Seagram's Superior 94 Proof	1 to 4	$13.26	$1.44	.....		$16.68	$ .89	.....		$10.59	$0.12
	5 or more	12.65		.....		15.92		.....		10.10	
Kessler's Blended Whiskies (Seagram-Distillers Corporation—Selling Agents)											
Kessler's Private 90 Proof	1 to 4	.....		$15.60	$1.77	$16.32	$0.93	$17.22	$0.49	.....	
	5 or more	.....		14.90		15.58		16.44		.....	
Kessler's Preferred 90 Proof	1 to 4	.....		$18.00	$1.98	$18.72	$1.04	$19.62	$0.55	.....	
	5 or more	.....		17.13		17.86		18.72		.....	

SEAGRAM—DISTILLERS CORPORATION
Room 932—20 North Wacker Drive
Chicago, Ill.
Telephone FRAnklin 5435

Quantity Prices apply to full case lots of assorted Seagram's and Kessler's brands only. Above Prices Include Illinois State Tax of $1.20 per case for 4/5 Quarts, $1.50 per Case for Quarts, Pints and Half-Pints and $0.75 per case for Miniatures.

[fols. 20-17–20-19] EXHIBIT 5

A photograph of a window of defendant's store at 208 West Madison street, Chicago.

EXHIBIT 6

A photograph of a window of defendant's store at 209 South Wabash avenue.

Summons.

Motion for temporary injunction filed November 19, 1935.

Appearance.

Verified answer of defendant filed November 21, 1935.

[fol. 20-20] Reply of plaintiff, filed November 21, 1935.

[fol. 20-21] Injunction writ.

[fol. 20-22] Decree.

Notice of appeal and proof of service thereof on plaintiff's counsel on December 2, 1935, filed by defendant December 5, 1935.

[fol. 20-23] Notice of filing præcipe for trial court record, and proof of service thereof on plaintiff's counsel on December 2, 1935, filed by defendant December 5, 1935.

Præcipe for trial court record filed by plaintiff on December 2, 1935.

Stipulation.

Certificate of evidence, filed January 4, 1936.

Statement of Evidence

Hearing on November 30, 1935, on plaintiff's motion for a temporary injunction. Present: Mr. Isaac H. Mayer and Mr. Richard Mayer, representing the plaintiff; and Mr. Irving Breakstone, representing the defendant.

COLLOQUY

The Court: The court wishes to be fully informed, and if the other side has not been paying any attention to the law in this matter until this morning, I will give them further time.

Mr. Richard Mayer: The only thing is we feel that we should have in the meantime, if the court please, inasmuch

as we have a contractual arrangement between the parties set up under oath, and not denied, and deliberate violation going on, causing irreparable injury, that we should have an understanding that during the time counsel is afforded this opportunity to study this question, we do not want these practices to continue.

The Court: That will influence the court in making the time as short as possible.

Mr. Breakstone: We would like an opportunity to answer.

Mr. Isaac Mayer: Are you willing to agree that you will not advertise and cut the prices in the meantime?

Mr. Breakstone: No. I have had no opportunity to talk with these gentlemen. I am familiar somewhat with the [fol. 20-24] price-cut cases in the dyeing and cleaning cases. And that is the way that I know about it.

The Court: You will have to answer, and argue it tomorrow.

Mr. Breakstone: We will have to file our answer by tomorrow and argue the case.

The Court: And argue it tomorrow.

Mr. Breakstone: All right. Tomorrow is Thursday.

The Court: Tomorrow at 11 o'clock.

Mr. Breakstone: We are to come in tomorrow at 11 o'clock.

Mr. Richard Mayer: In the meantime I understand that counsel does not agree that they will refrain from continuing these violations.

Mr. Breakstone: I can't agree to anything like that. I have not had the opportunity to talk with my clients, and I don't know what——

Mr. Isaac Mayer: Is there anybody here representing the company authorized to make such a statement?

Mr. Breakstone: No.

Mr. Isaac Mayer: You have been pointing to some gentlemen here.

Mr. Breakstone: This man happens to be a client of mine, and he is also a lawyer, who was interested in the dyeing and cleaning matter. The directors of the corporation are the proper ones to speak for the corporation.

Mr. Isaac Mayer: You made a remark a few moments ago, that this gentleman here called you into this case.

Mr. Breakstone: Mr. Greenspahn called me into the case. [fol. 20-25] Mr. Richard Mayer: Mr. Irving Greenspahn, you are a director of this company.

Mr. Greenspahn: I think I am.

Mr. Richard Mayer: And you are a vice president.

Mr. Greenspahn: I am at the present time,—I may be.

Mr. Richard Mayer: Mr. Samuel J. Greenspahn, you are secretary and treasurer of the defendant company.

Mr. Samuel Greenspahn: I am.

Mr. Richard Mayer: And you are Mr. Howard Blum, president of the company?

Mr. Blum: That is right.

Mr. Isaac Mayer: I think under those circumstances, with the president and officers of the corporation here they could make that statement.

Mr. Richard Mayer: And here are the directors, Howard Blum, Samuel J. Greenspahn, and Irving Greenspahn.

Mr. Breakstone: Well, this is to go over until 11 o'clock tomorrow.

The Court: One day won't make any difference——

Mr. Isaac Mayer: But it throws a little light upon the statement made by counsel when he said that he had no right to speak for the corporation, when all the directors are here in court, and particularly in view of his remarks that this contract sued on was not signed by the defendant.

The Court: I heard him the first time, and I heard him the second time, but I wish to be informed on this matter, and grant this day's delay, so that I may learn what the law is by those interested on both sides.

Mr. Richard Mayer: All right, your Honor.

(Adjourned.)

[fol. 20-26] Samuel J. Greenspahn, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Richard Mayer:

My full name is Samuel J. Greenspahn. I live at 3333 Washington boulevard and am 39 years old. I am secretary and treasurer of Old Dearborn Distributing Company.

I think I have acted as such about a year and three quarters. I believe that company—Old Dearborn Distributing Co.—was formed December 6, 1933. That is the defendant in this case. I am also a director of that company. I have the corporate minute book here and here it is.

Mr. Richard Mayer (to Mr. Irving Greenspahn): Your name is Irving Greenspahn?

Mr. Irving Greenspahn: Yes.

Mr. Richard Mayer: And you are a director of that company?

Mr. Irving Greenspahn: Yes.

Mr. Richard Mayer: And vice president of the defendant company?

Mr. Irving Greenspahn: Yes.

Mr. Richard Mayer: You have filed your appearance in this case, have you?

Mr. Irving Greenspahn: Yes.

The Witness: I guess Mr. Irving Greenspahn is a director of the company. He is one of my codirectors and the other director is Mr. Howard Blum. He is the president of the company. I think the company applied for a retail license to engage in the sale of alcoholic liquors at retail at 208 West *West* Madison street, Chicago, to the office of the Liquor Control Commission in the name of Old Dear- [fol. 20-27] born Distributing Company. I am pretty sure. I don't know if the company adopted any trade names. I may have signed applications for retail licenses at places other than 208 West Madison street. We applied for a store at 209 South Wabash avenue under the name of Old Dearborn Liquor Store—either singular or plural, I don't really know offhand. I believe the north side store at 3202 Lincoln avenue is operated under the name of Old Dearborn Liquor Store—either Store or Stores.

Q. Have you advertising matter available on these various stores in the form of cards?

A. I think so.

We own and operate, and have within the last three months, three different stores in the City of Chicago; one at 209 South Wabash avenue, one at 208 West Madison street, and one at 3203 Lincoln avenue. I am just through giving you the names. I told you there was the Old Dearborn Distributing Company on Madison, Old Dearborn

Liquor Store at 209 South Wabash avenue and an Old Dearborn Liquor Store at 3202 Lincoln avenue. I am sure that those stores are not operated under the name of Old Dearborn Liquor Stores, Inc. I have not, that I know of, seen the card marked Plaintiff's Exhibit 1, or a similar card at our store at 209 South Wabash avenue. I did not personally ever see any such card at that store. I hardly spend any time at that store. I spend most of my time at 208 West Madison.

Plaintiff's Exhibits 1 and 2 were offered and received in evidence. Plaintiff's Exhibit 2 is in words and figures as follows:

[fol. 20-28] PLAINTIFF'S EXHIBIT 2

209 So. Wabash Ave. Webster 1477.

Old Dearborn Liquor Stores Inc.

208 W. Madison St.—Dearborn 1770

Free Delivery

3202 Lincoln Ave.
Buckingham 1770

65 E. Van Buren St.
Webster 2646

Plaintiff's Exhibit 1 is a similar card received at defendant's store at 209 South Wabash.

I have not seen cards like Plaintiff's Exhibit 2 on different occasions around the store at 208 West Madison, where I spend all of my time. I haven't seen this type of card. I am not familiar with the cards. I don't even bother with them. I don't bother with them a bit. We might have them. It may be, but I don't know anything about them. I don't deny or affirm what cards are over there at all. I don't carry cards with me. I really can't tell if there are any cards of this type in the store at 208 West Madison street. I never saw any cards there such as Plaintiff's Exhibit 2. My duties as secretary and treasurer of Old Dearborn Distributing Company are to buy and sell, wholesale and retail. We have just one bank and keep it at the Terminal National Bank. Howard Blum and myself sign checks. Either one of us can sign.

Either Howard or I take care of paying the bills for the company. Either Mr. Blum or myself would pay for cards or advertising matter for the company.

Mr. Blum spends most of his time, I would say 75 or 80 per cent of his time, at 208 West Madison street. That is my signature, Samuel J. Greenspahn, secretary and treasurer, on Plaintiff's Exhibit 3. The words "Old Dearborn Liquor Stores, Inc." are right there. My signature is right there under those words.

[fol. 20-29] I didn't write "Old Dearborn Liquor Stores,"

The Court: I wish you would go to some other question.

Mr. Richard Mayer: May I take a moment's time, regardless of the explanation given by the witness, to explain the question?

The Court: I think you will have no trouble in establishing that they used that particular name.

Mr. Richard Mayer: No, sir.

The Witness: The concern known as Old Dearborn Liquor Stores, Inc., was doing business nowhere that I know of.

The Court: That is you are saying that because you don't happen to remember the "Inc."

A. No; I don't think we ever did any business anywhere under "Inc." I may be wrong. I don't think we did. When I signed Plaintiff's Exhibit 3 I was representing myself. Personally I was doing business for the corporation, Old Dearborn Distributing Company, at 208 West Madison Street.

Q. And at the time you were signing that contract did you have any business other than that which you were performing for the Old Dearborn Distributing Company?

A. Well, I may have made one or two outside buys for myself.

Q. Those had no connection with the execution of this agreement so far as you can now recall, did they?

A. No.

At the time this contract marked Plaintiff's Exhibit 3 was executed, the defendant, the Old Dearborn Distributing Company, was then operating the stores at 209 South Wabash avenue, 208 West Madison, and one on the north side on Lincoln avenue, and as far as I know there was no corporation had any existence under the name of Old Dearborn Liquor Stores, Inc.

[fol. 20-30] I believe I have been in the north side store once; I don't think more than that. Howard or I pay the

bills for the north side store. I never paid any bills for cards at the north side store to my recollection. I never saw a card like Plaintiff's Exhibit 7, showing Old Dearborn Liquor Stores, Inc., and showing 208 West Madison street and 209 South Wabash avenue. I may have been secretary and treasurer of a company other than Old Dearborn Distributing Company, but not of a company that had a name in any way similar to that company. At the time I signed that contract marked Plaintiff's Exhibit 3 I was not secretary and treasurer of any other corporation, other than Old Dearborn Distributing Company. Plaintiff's Exhibit 5, which is a photostat of a corporate form of application for a renewal license, has a copy of my signature. This covers the store located at 209 South Wabash avenue. That is my signature. I was executing that application on behalf of Old Dearborn Distributing Company and I gave the corporate name as Old Dearborn Distributing Co.

Q. Does this recall to your mind that the Old Dearborn Distributing Co. did operate under trade names of one kind or another?

A. Well, we had the name of Old Dearborn Liquor Store. They were just names of stores.

Q. They were the trade names of the business, were they not?

A. Yes, trade names of the business.

Plaintiff Exhibit 4 correctly shows my signature on the application for renewal of license to the State of Illinois for the store at 208 West Madison street. The trade name of the business used in the application was Old Dearborn Distributing Company. Plaintiff's Exhibit 6 is a correct [fol. 20-31] photostat of my signature on the original application for the store at 3202 Lincoln avenue.

Q. What is the name of the applicant written on that, to which you have fixed your signature?

A. Old Dearborn Liquor Store.

Plaintiff's Exhibits 4, 5, 6 and 7 were received in evidence:

Said Exhibit 4, consisting of application for renewal of retailer's license and also original application for said license, filed with the Illinois Liquor Control Commission in connection with its store at 208 West Madison Street, Chicago, Illinois; said Exhibit 5 consisting of application for renewal of retailer's license and also original application

for said license filed by defendant with the Illinois Liquor Control Commission in connection with its store at 209 South Wabash Avenue, Chicago, and in the application for renewal license it is stated that the trade name of applicant's business is "Old Dearborn Liquor Stores"; and in the application for original license it is stated that the business is conducted under the name "Old Dearborn Liquor Store"; Exhibit 6, consisting of application for renewal of retailer's license and also original application for said license filed by defendant with the Illinois Liquor Control Commission in connection with its store at 3202 Lincoln Avenue, Chicago, Illinois, and in both applications it is stated that the trade name of applicant's business is "Old Dearborn Liquor Store"; Exhibit 7, being a card similar to Plaintiff's Exhibits 1 and 2, received at defendant's store, 3202 Lincoln Avenue.

I don't know what goes on at 209 South Wabash. I was only there once. At 3202 Lincoln avenue I was there about once, that is about all. At 208 West Madison I haven't seen [fol. 20-32] those cards. I cannot say much about the other two stores. I don't know what they do or what they distribute. I haven't seen cards like Plaintiff's Exhibit 2 available for distribution or distributed at 208 West Madison street. I never buy any cards. Cards may be paid for out of the petty cash account. They may have come in and been paid for in cash right over the counter. I don't know a thing about that. Surely our company have cards, but I don't take care of the orders. I don't know the name of the printer. I have never ordered them.

The Court: They would hardly spring into existence by anything but an order, the business using the advertisement itself, I am speaking of it as being useful evidence, its own existence.

William Lloyd, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Richard Mayer:

My name is William Lloyd. I live at 4911 West Superior street. I am manager of the parking lot at 12 South Market

street in the City of Chicago,—public auto parking. I had occasion to go to the liquor stores at 208 West Madison street and 209 South Wabash avenue in the city of Chicago last Monday afternoon, November 18, 1935. I first went to 208 West Madison street. I went into the store and asked the clerk for Five Crown Seagram's Whiskey. He gave me a pint of whiskey and I asked him how much it was and he said $1.16 and I paid the man and I said, "Will you give me a receipt for the bottle of whiskey. I just bought,—I am buying it for another party and I want to be [fol. 20-33] sure I get my money back." And the fellow said "O. K." and he made out a receipt and gave me a duplicate of it and said,—it said: "1 Pint of Five Crown Seagram, $1.16," with the heading of the company on it, and I said to put the date on it, and also sign it, so the receipt he gave me was the duplicate, and he signed it with pencil. He made the duplicate and signed it with pencil, and gave me the receipt. I went back and gave it to the party who asked me to buy it and he said, "Did you get any advertising in there? And I says that I forgot; I didn't see anything on the counter. But I went back to the store and asked the clerk if he had any cards; that they were getting it for out-of-town people, so he gave me about a dozen or fifteen or twenty cards, and I brought them back and gave them to the party who sent me.

I gave them to Mr. McCray, who is sitting in the court room.

(The cards referred to by the witness were marked Plaintiff's Exhibit 2-A to 2-E, inclusive, for identification.)

Plaintiff's Exhibit 8 is a wrapper with the name on it, "Old Dearborn" and with the two stores, 208 West Madison and 209 South Wabash avenue marked on it. Plaintiff's Exhibit 9 is the receipt that I have been referring to, and the signature I refer to is on that receipt. Plaintiff's Exhibits 2-A, B, C, D, and E, and a batch of other similar cards are the ones which I got at 208 West Madison street. They were at the north end of the counter, next to either the cash register or an adding machine. They were lying right there on the counter. At the time I got those cards I got a bottle of Seagram's Five Crown Blended whiskey, [fol. 20-34] such as the bottle you now have in your hand, in a wrapper such as Plaintiff's Exhibit 8.

Mr. Mayer This is Seagram whiskey.

Plaintiff's Exhibits 2-A to 2-E, inclusive, and Plaintiff's Exhibit 8 were received in evidence. Said Exhibits 2a to 2e, inclusive, being cards identical with Plaintiff's Exhibit 2 and said Exhibit 8, being a wrapper on which is printed "Old Dearborn Liquor Store," and the address 208 West Madison Street and 209 South Wabash Avenue.

I went back to work and about an hour later Mr. McCray came in again and asked if I had a half hour's time to make another trip, and I said sure, and he took me in his car to 209 South Wabash, and I went in there and repeated the same thing. I asked the clerk for a bottle of Five Crown Seagram whiskey, and he gave me the bottle, and I asked for a receipt, and he gave it to me, receipted it, and gave it to me, and there were cards lying on the counter. I picked those up and came out with the package, and the receipt and the cards, to Mr. McCray and gave it to him. The price was $1.16 a pint. That was the same price I paid at 208 West Madison street. Plaintiff's Exhibit 10 is a receipt I got for the Seagram's Five Crown whiskey at 209 South Wabash avenue. Plaintiff's Exhibit 9 is the receipt from 208 West Madison. Number 10 is the receipt from 209 South Wabash.

Plaintiff's Exhibits 9 and 10 were offered and received in evidence. (Said Exhibit 9, being a receipt from defendant's store at 208 West Madison Street, Chicago, Illinois; said Exhibit 10 being a receipt with the caption "Old Dearborn Liquor Stores" at the top and with the following addresses: 208 South Wabash Avenue, 208 West Madison Street, 3202 Lincoln Avenue and 1606 Belmont Avenue.)

[fol. 20-35] The large number of cards just produced by the witness Lloyd are the same as Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2-A, B, C, D, and E, and a large number not marked are the same as Plaintiff's Exhibit 2.

I bought a pint bottle of Five Crown whiskey at 209 South Wabash.

Cross-examination.

By Mr. Breakstone:

I am 22 years old. The gentleman who came to get me to make these purchases was Mr. McCray. I knew that he was with the Seagram-Distillers Corporation, the plaintiff in this case. I have known him two or three months.

I had made purchases for him at other places than the defendant liquor stores. McCray asked me if I would do him a favor and I said sure I would be glad to, and he told me what he wanted and I went and did it. He asked me if I would go over to the Old Dearborn Liquor Store and buy a pint bottle of Seagram whiskey and get a receipt, with the date, and have it signed by the clerk, and also whatever the amount was that it cost, and the receipt, and also to pick up any advertising matter that I saw there.

He gave be the money to buy the whiskey. I think it was $2. for the purchase at 208 West Madison. I paid $1.16. Mr. McCray didn't pay me anything for doing this work. I gave him back the change and delivered the whiskey. Mr. McCray didn't tell me the purpose for which he wanted me to make the purchase. That was in the afternoon of November 18. On the second purchase we were going over to 209 South Wabash and I said, "What are you buying the whiskey for; I thought we were working for the liquor [fol. 20-36] trust." And he said, "I was just checking up on the prices of them." I said, "O. K." It is none of my business what he wanted to buy the whiskey for. McCray gave me the money to buy the whiskey at 209 South Wabash at the Old Dearborn Distributing Company. He did not pay me for my services there. I haven't been paid any money by anybody for my services in this case. The purchases were made for McCray and I knew at the time that McCray told me he was checking up on the prices that Seagram whiskies were being sold by this Old Dearborn Distributing Company and my services were being rendered to McCray wholly as a favor.

Plaintiff's Exhibits 11 and 12 were offered and received in evidence. Said Exhibit 11 being a certified copy of the certificate of incorporation of plaintiff and said Exhibit 12 being a copy of plaintiff's application and certificate of authority to do business in Illinois.

CLARENCE G. MCQUAIDE, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Richard Mayer:

My full name is Clarence G. McQuaide. I live at 80 Northfolk road, Clarendon Hills, Illinois. I am western manager of Seagram-Distillers Corporation, the plaintiff in this case, which first began to do business in the State of Illinois approximately June 29, 1934. Its business is the sale and distribution of Seagram's products, which bear trade-marks, brands or names. I refer to Seagram's Pedigreed Rye and Bourbon, Seagram's Ancient Bottle; Seagram's bourbon; Seagram's V. O., Seagram's 83, and Sea-[fol. 20-37] gram's Five and Seven Crown. The latter are blended whiskies. The first named are bonded whiskies. Also Celebrated and Seagram's King Arthur gin; Kessler's Private and Kessler's Preferred. The latter are blended. Each of these brands to which I have referred differ materially one from the other. They each carry trade-marks, names or brands distinctive as to each particular one. These beverages distributed by my company are sold under those brands, names and trade-marks in the State of Illinois, since the date I have mentioned.

They are sold in standard size bottles and containers. They run, four-fifths, quarts, pints, and half pints. The producers of these Seagram's and Kessler's whiskies are Joseph E. Seagram & Sons, Inc. and Joseph E. Seagram & Sons, Ltd. Each of these beverages or brands are in competition with commodities of the same general class produced by persons other than those I have just named here. The names of some of the competing brands are Old Granddad, Old Taylor, Hiram Walker's DeLuxe Rye, Hiram Walker's makes bourbon, rye, and Canadian whiskies. Those are in competition with the Seagram products. There are other Canadian whiskies that are sold in competition with Seagram whiskies here in Chicago. The United Distillers, Limited; that is a Canadian company younger in distribution in the state, however, and less known. There is also G. & W., which is a Canadian whiskey.

Seagram-Distillers is a Delaware company. It is a sales company for all Seagram's products, whether distilled here in this country or in Canada.

The names of some of the American distilled whiskies that are constantly in competition with the different Sea- [fol. 20-38] gram brands are Old Granddad and Old Taylor, made by the American Medicinal Spirits. There are easily more than fifty different brands of whiskies on the market in the City of Chicago, all of which are in competition one with the other and with the Seagram products that I have referred to.

The plaintiff has expended large sums of money in connection with the sale and distribution of these Seagram products in the State of Illinois. I would say around $200,000 has been spent in advertising Seagram products since the first of this year in the State of Illinois. I would say that approximately $2,000,000 has been spent since the first of this year in advertising Seagram products nationally, in addition to that which has been spent merely in the State of Illinois.

There are five whiskey manufacturers other than Seagram whose products are in competition with Seagram's products here in the City of Chicago and State of Illinois. There are many more producers than that, but there are certain ranges that are considered most competitive, and I would say that in that group there would be approximately five.

It is impossible to estimate the number of producers in addition to those particular ones. It would depend on how far down I went. If we included the rectifier who blends young whiskies as distinct from distilling. They buy distilled liquor and then blend it. These whiskies that are the result of rectifying as distinct from distilling are also in competition with Seagram brands.

Since the plaintiff has been operating in the distribution of Seagram products in the State of Illinois, it has been the sole person, firm or corporation that has been authorized [fol. 20-39] to regulate and control the distribution of Seagram and Kessler whiskies in this state and in the City of Chicago.

In operating our business in the City of Chicago and State of Illinois, we sell to wholesalers only. The wholesaler or jobber then sells to the retailer. At the present

time we have twelve wholesale distributors in the City of Chicago. During all of the period of time covered by the complaint in this case, we had that number, and for the last couple of months. The defendant is regarded as a retailer, although in some cases it may be operating as a wholesaler; but actually it is operating three retail stores mentioned here. The plaintiff does not sell directly to the Old Dearborn Distributing Co.

I am familiar with the Illinois Fair Trade Act. Since its enactment the plaintiff has executed contracts under it with all of its distributors in the State of Illinois, and since the middle of October every one of these distributors has been operating under one of those Fair Trade contracts. Since the middle of October, 1935, the plaintiff has not sold or distributed any Seagram's products that were not subjected to these contracts. Exhibit 2 to the complaint is one of the Fair Trade contracts with distributors, which has been in force with every one of our distributors in the State of Illinois since the middle of October. The company has executed contracts with retailers in addition to the type executed with distributors.

Plaintiff's Exhibit 1 attached to the complaint is the form of contract which has been executed with numerous retailers throughout the state. I personally had nothing to do with the actual execution of Plaintiff's Exhibit 1, by the Old Dearborn Distributing Co. Since the middle of Octo-
[fol. 20-40] ber, 1935, the plaintiff has not sold or distributed any Seagram products that are not subjected to these contracts which I have just referred to. None of Seagram's products that have been referred to here this morning are now sold by the plaintiff excepting under these Fair Trade contracts; that is, Plaintiff's Exhibit 2 to the complaint, the distributors contract, and Exhibit 1 to the complaint, the retailers contract.

The effect of the defendant's price cutting as to others who have signed these Fair Trade agreements with the plaintiff would have the effect of causing them either to cut to meet the present prices or to shelve the merchandise,—curtail its sale.

Cross-examination.

By Mr. Breakstone:

The plaintiff corporation is merely a sales agency and not manufacturers of liquor. They are not producers. The

producers of the liquor in question here are two corporations named Joseph E. Seagram & Sons, Ltd., and Joseph E. Seagram & Sons, Inc.

I don't know the facts definitely as to whether both of those corporations are Canadian corporations. They are not licensed to do business in Illinois. Seagram-Distillers Corporation, the plaintiffs, is licensed to do business in Illinois.

Seagram-Distillers Corporation buys its liquors that are described in the complaint from Joseph E. Seagram & Sons, Inc. and Limited. I know that of my own knowledge. Those sales are consummated at our executive office in New York City. When the plaintiff sells merchandise to a distributor here in Illinois, the merchandise is produced in various places; some in the United States, in Lawrenceberg, Indiana.

[fol. 20-41] The plaintiff, or the Seagram, Ltd., or Seagram, Inc., do not have any producing plants in the State of Illinois. All the whiskeys and liquors that are described in the complaint are produced outside the State of Illinois and sold to the Seagram-Distillers Corporation, and they are delivered to the Seagram-Distillers Corporation, which takes delivery of them right here in Chicago. There is a warehouse maintained for the purpose. The plaintiff corporation has a warehouse here in Chicago. All of these liquors are shipped into that warehouse from Seagram, Ltd., or Seagram, Inc. Bills of sales are exchanged; definite billing is rendered through Seagram-Distillers Corporation. I don't know anything about exchanges of cash for this purpose between these corporations. We remit all funds to our executive office. This merchandise shipped in here, into the warehouse in Chicago, is paid for at the New York office.

The plaintiff never sold any liquors directly to the defendant. The plaintiff does not handle liquors other than those described in the complaint, except possibly as a clearing house for some merchandise being closed out by a former subsidiary corporation.

None of the Seagram brands named, none that are sold or controlled by Seagram-Distillers Corporation, were sold by the plaintiff directly to the defendant.

Between October 8th and October 21st of this year we sold the defendant, for the Hillcrest Distilling Corporation,

a close-out of a subsidiary. It was not our merchandise. It was merchandise of the Hillcrest Distilling Corporation.

(Defendant's Exhibits 1 to 10 marked for identification.)

[fol. 20-42] I recognize these exhibits as the statements of accounts between the plaintiff and the defendant corporation. The plaintiff had business dealings with the defendant directly concerning brands that were the property of a former company, the Hillcrest Distilling Corporation.

We have a man by the name of Mr. Maas in our employ. I recognize his signature on Defendant's Exhibit 10. I never had any dealings myself directly with any officers of the defendant corporation. I know Mr. Samuel J. Greenspahn. I had no dealings with him with reference to the negotiations of this contract referred to as Exhibit 1 to the complaint. I had no negotiations with him at all. I am under the impression it was Mr. Maas. I don't recall if this contract referred to as Exhibit 1 in the complaint was signed by him before or after Mr. Greenspahn signed it.

There are no contracts similar to the Fair Trade contracts with distributors and retailers existing between the plaintiff and Seagram & Sons Limited or Seagram & Sons, Inc.

At the time of the execution of this Fair Trade contract with the defendant, I knew nothing personally of the negotiations that went on. There is no other Seagram merchandise such as is described in the complaint, that I know of, that is held for sale by jobbers and/or wholesalers who have acquired the same other than directly from us.

The labels on the merchandise we sold or cleared for the Hillcrest Distilleries were labels of the Hillcrest Distilling Corporation. I could not say if there are any jobbers in Chicago that have stocks of Seagram that they have acquired other than from the plaintiff. I could not tell you if [fol. 20-43] there is any Seagram merchandise here that has been acquired by persons other than those in contractual relationship with us or the two Canadian companies. In the course of my management of the corporation I have not run across any such stocks being offered for sale in this community. Schenley products are in competition with Seagram's in this community. There are absolutely no contractual relations between Seagram-Distillers Corporation and any other corporation engaged similarly in the sale of products in Chicago at fixed prices. The only price-fixing

contracts that I know about are those mentioned in the complaint.

I know of a firm in Chicago called the Pioneer Distillers. They are distributors of Seagram products. I know of the Roxy Liquor Company. They are sub-distributors under one of the twelve key distributors. I can't tell you without checking if the Roxy Liquor Company has executed a distributors or retailers contract. We have contractual relations with our distributors and they control the redistribution.

Seagram-Distillers Corporation has not sold any other beverages or liquor to the defendant other than that described in Defendant's Exhibits 1 to 10. Plaintiff does not sell merchandise directly to retailers. Exhibits 1 to 10 were sold to the wholesale division of the company named. We have never had a distributors' contract with the defendant corporation.

By price cutting I mean any price below that named by the owner of the brand. By that I mean any price below that set up in the minimum schedule of prices fixed by Seagram-Distillers Corporation.

The Court:

[fol. 20-44] Q. When you said you were not selling to the defendant the Seagram brands, you had in mind that you were selling the Hillcrest brand, is that it?

A. Yes; Hillcrest was a former corporation, subsidiary to Seagrams, and was closed out, and the license was withdrawn from the Hillcrest corporation.

Q. Now in this contract, that is Exhibit 1 in this case, I thought it was a contract referring to the Seagram brand. Was it, or was it not, signed by Maas?

A. No, it was Hillcrest brands; the brands had been discontinued, and the corporation discontinued; and Hillcrest owned the labels.

Mr. Breakstone:

Q. Mr. McQuaide, you stated that the effect of the sales by the defendant below the prices fixed by your corporation curtailed the sale of liquor by Seagram-Distillers, Incorporated; is that true?

A. Yes, sir.

Q. How do you know that as a fact?

A. By, oh, some twenty years of experience in merchandising. No man——

Q. Well, have you.

Mr. Isaac Mayer: Let him finish.

Mr. Breakstone: Pardon me. I did not mean to interrupt you. Go ahead, Mr. McQuaide.

The Witness: No man can interest himself in the sale of merchandise unless he makes a living wage.

Q. Well, I do not want to go into that.

A. We have set up our profit according to the best opinions of what a living wage is for a retailer and——

Mr. Breakstone: That is beyond the purview of the question. I do not want that.

Mr. Richard Mayer: You asked him for that.

The Court: He has not answered the question.

The Witness: I don't have the records of the plaintiff's [fol. 20-45] sales here in Chicago for the month of November. I would say that our sales the 14th, 15th and 16th of November up to that period will be less than the 14th and 15th of November last year. The sales from that period on to the end of this month, to date,—I know they are less than they should be in comparison with last year's volume. I claim that is due to the effect of the cuts of the defendants here in selling at the prices they are charging. It lessens the demand for our products by the distributors. It also lessens the demand for the products by the consumer. The consumer questions whether he is getting good Seagram whiskey or whether he is getting not so good, whether the quality of the product is there, and he hesitates to buy it.

By Mr. Breakstone:

Q. As a matter of fact, don't the retailers sell this liquor at lower prices in order to effect larger volumes?

A. They sell it many times at lower prices in order to meet the competition with which they are faced in a given neighborhood.

Q. But don't they do it also to increase their sales?

A. Not by any manner or means does that necessarily follow. They use it on the principle of the loss leader, which enables them to bring people into their store and sell some other products, to the detriment of the particular product advertised.

Q. And is that practice indulged in by the defendant here, using this liquor as a loss leader?

A. That I could not say.

Q. When you say using your Seagram liquor as a loss leader, you mean selling it below cost, don't you?

A. Not necessarily; selling it at any profit, at any price less than that named by Seagram-Distillers. The price of the Five Crown blended whiskey should have been $1.35 a pint. It was sold by the defendant at $1.16. I don't [fol. 20-46] know the prices the defendant paid for this liquor when they bought it.

Q. When you say they sell it as a loss leader, the word "loss" does not imply that they are selling it below cost?

A. No, sir. They may sell it at some figure over their cost, but still not sufficient to cover their overhead, which would still result in a net loss.

Q. Well, it is only a confusion in the terms. There would be a loss there?

A. Standard practices are followed in setting up a markup for retailers and wholesalers. I think the markup, according to statistics established through years of various products, will show a retailer needs 33⅓ per cent profit in the merchandise he invests his money in, in order to pay his bills, keep the rent paid and have a livelihood from the store. We have only set what we believe to be a normal profit, which is approximately 33⅓ per cent. Anything he sells under that figure we maintain is sold at a loss to him.

Q. In other words, you fix prices so as to determine the profit that you think the retailer ought to get?

A. To help him make a profit and stay in the business.

Q. You arrive at the cost that each retailer must sell his product at by taking a hypothetical cost of doing business among retailers over a large area, don't you?

A. We use that merely as a guide.

Q. In a hypothetical case?

A. We use it merely as a guide.

Q. You do not take the actual cost——

The Court: How could he? Go to some other question, please.

Mr. Breakstone: All right, your Honor.

The Witness: It is impossible.

[fol. 20-47] CLARE L. MCCRAY, a witness called on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Richard Mayer:

My full name is Clare L. McCray. I reside at 1515 East 63rd street. I am a salesman for Seagram-Distillers Corporation. I had occasion to visit the store operated by the defendant at 208 West Madison street on Saturday, November 16th.

I made a purchase of liquors at that time and obtained a receipt therefor. I also picked up a card which laid on the counter in a small box.

(Plaintiff's Exhibits 13 and 14 marked for identification.)

I went to the store at 208 West Madison street between 9:15 and 9:25 A. M. I went into the store and the man that approached me, I asked him what he would suggest in a good bottle of whiskey. He suggested to me Canadian Club, Walker's Canadian Club at $1.89 a pint; also Walker's Peacock 7-year old brand, a pint $1.49, I think it was, $1.89. I am not positive of that; and also two or three other brands. I just cannot remember the names.

At that time I asked for a bottle of Seagram's Ancient bottle Rye. I inquired what it was, and the answer was that it is real rye and bourbon mixed. I asked what the difference was between rye and bourbon and I was told "very little." I had inquired as to what the price was and I was told it was $2.29, on sale that day, a special sale they were having on it. In fact, it was marked down at that time to $2.29. Then I asked what V-O was, as to the age, [fol. 20-48] and I was told it was 6-year old whiskey, straight Canadian, at $2.08 a pint; so I made up my mind to take two pints, one Ancient Bottle Rye and one V-O. The man wrapped it up. I asked if I could get a receipt and he said, "Surely." Plaintiff's Exhibit 14 is the receipt that he gave me. Plaintiff's Exhibit 13 is the card that I got from that store at that time.

(Plaintiff's Exhibits 15 and 16 were marked for identification.)

Plaintiff's Exhibits 15 and 16 are the Seagram Ancient Bottle Rye and the Seagram's V-O that I bought there that

morning. That is Seagram merchandise, and the carton in which that bottle, Seagram's Ancient Bottle of Rye is contained, is in the same shape as it was in when I got it there that morning. The name Old Dearborn Liquor Stores at the top of it was there. The same is true with reference to the V-O. That is Seagram merchandise.

I heard Mr. Lloyd testify concerning purchases at 208 West Madison and 209 South Wabash. The two bottles which he purchased and which he identified here this morning are Seagram products; that is, the plaintiff's. The names, labels, and trademarks appearing on those bottles I have just identified are the trade marks, names and labels of the plaintiff corporation, under which the plaintiff corporation sold Seagram products and which were purchased from the defendant at the time I have just referred to.

(Plaintiff'- Exhibits 13, 14, 15, 16 and 16A, and said Exhibit 13 being a card identical with Plaintiff's Exhibit 2, and said Exhibit 14 being a receipt from said store with [fol. 20-49] the caption "Old Dearborn Distributing Co.", and the address 208 West Madison Street at the top of said receipt. Plaintiff's Exhibits 15, 16 and 16a, being bottles of Seagram's Ancient Bottled Straight Rye Whiskey, Seagram's V. O. Rare Old Canadian Whiskey and Seagram's Pedigree Straight Rye Whiskey, respectively, were offered and received in evidence.)

I went back to the store on West Madison street that Saturday morning around eleven o'clock A. M. with Mr. Melick, who also worked for the plaintiff. I saw Mr. Samuel Greenspahn, who is sitting here in the courtroom now. There was a conversation between him and Mr. Melick and myself.

As we entered the store we asked for one of the proprietors or directors or executives, Mr. Howard Blum. We were told he was not in, but Mr. Greenspahn was in the rear of the store. This information was given us by Mr. Harry Brown. We approached Mr. Greenspahn relative to the cutting of prices of merchandise. We told him we were very much interested in him maintaining the prices; in other words, the corporation or the company he was representing maintaining prices. We had introduced ourselves before. He said he was not interested in what Seagram-Distillers wanted him to do. We merely mentioned that he had signed a contract with us relative to that, and

we wanted him to live up to it, which he stated that he did not care to do. At that time Mr. Melick asked him if he had received one of the letters through the mail with our current price list attached, and he said he had.

Exhibits 3 and 4 to the complaint are the letter and the price list to which I have reference.

After Mr. Melick made that inquiry, Mr. Greenspahn [fol. 20-50] responded that he had received one. He did not particularly pay any attention to it, as to our knowledge. We also asked him or insisted at the time that he change his—take the sign down on which his prices were shown.

At that time we had with us additional copies of that letter and price schedule. Mr. Melick handed an additional copy of Exhibits 3 and 4 to the complaint to Mr. Greenspahn. After handing those to Mr. Greenspahn we were told that nothing would be done; he would not take the sign down or discontinue cutting prices. The sign that I have reference to on the window is shown in the photograph marked Exhibit 5 to the complaint. As we were leaving, at that time, we again asked Mr. Greenspahn if he would consider maintaining his prices. He said no, absolutely not, he would not.

On the same day, November 16th, last Saturday, I visited the store at 209 South Wabash avenue. I was accompanied by Mr. Melick. It was between 1:00 and 1:30 in the afternoon. We made a purchase, paid for it, and got a receipt, which is Plaintiff's Exhibit 17. The name on the top of that receipt is Old Dearborn Liquor Stores. I bought a pint of Ancient Bottle, a pint of Seven Crown, a pint of Five Crown; paid $1.13 for the Five Crown, $1.39 for the Seven Crown; paid $2.29 for the Ancient Bottle.

Plaintiff's Exhibit 17 was offered and received in evidence, being a receipt received from defendant's store at 209 South Wabash Avenue, Chicago, with the caption "Old Dearborn Liquor Stores," and the addresses 209 South Wabash Avenue, 208 West Madison Street, 3202 Lincoln Avenue and 1606 Belmont Avenue at the top.

[fol. 20-51] I visited the store at 3202 Lincoln avenue, which has an additional address, 1606 Belmont avenue, on Monday, November 18, 1935. I made a purchase, obtained a receipt, and got a small card. Plaintiff's Exhibit 18 is the receipt. Plaintiff's Exhibit 7 is the card that I got at the store, bearing the name Old Dearborn Liquor Stores,

Inc., stating that there are other stores operated by the company in the Loop, mentioning 208 West Madison Street and 209 South Wabash avenue.

Plaintiff's Exhibit 18 was offered and received in evidence, being a receipt received from defendant's store at 3202 Lincoln Avenue with a caption identical to that contained in Plaintiff's Exhibit 17.

Cross-examination.

By Mr. Breakstone:

The plaintiff did not furnish me with the money to make the purchases. I purchased them out of my own pocket and was reimbursed by the plaintiff for the money so expended. I was not instructed directly by my superiors to make these purchases. Mr. Mayer, one of the attorneys for the plaintiff corporation, instructed me to make these purchases.

Mr. Richard Mayer: That is all, Mr. McCray. Just a moment.

Well, I have all of these bottles for these purchases, and I can line them up if counsel wants to check them and see and identify them, but possibly we can save time by counsel recognizing they are the particular Seagram brands.

Mr. Breakstone: And the bottles purport to bear on the face the Seagram labels.

Mr. Richard Mayer: Without stopping to identify any particular one.

[fol. 20-52] Mr. Breakstone: Any bottle that you produce, I will stipulate.

Mr. Richard Mayer: And they are bottles that were purchased at these various stores.

Mr. Breakstone: And the containers.

Walter E. Maas called as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

Mr. Richard Mayer:

I live at 5328 North Spaulding avenue, Chicago, and am general office manager for plaintiff. I saw Samuel J.

Greenspahn sign the document identified as Plaintiff's Exhibit 3 at my desk at plaintiff's office in Chicago on August 14, 1935, the date it bears.

The Court: What happened in connection with the contract, if anything, outside of the signing; was it in connection with the purchase by the defendant?

A. We had some of the close-out merchandise which was referred to by Mr. McQuaide, of the Hillcrest Corporation, and we have had some difficulties with Mr. Greenspahn's corporation.

Mr. Richard Mayer: The court is inquiring as to Plaintiff's Exhibit 3, and the execution of it.

The Witness: It was signed at that time because he was going to go along with us, and would purchase our Seagram products from correct sources and maintain prices. That is the reason.

(The aforesaid document was received in evidence as Plaintiff's Exhibit 3, which document is identical with Exhibit 1 to the complaint as set forth in full on pp. 6-8, supra.)

[fol. 20-53] Cross-examination.

By Mr. Breakstone:

Q. At the time Greenspahn signed this contract, which was in August of 1935, he did not buy any liquors from your company, did he?

A. We were negotiating for a sale of this Hillcrest merchandise.

Mr. Breakstone: I ask that the question be repeated, I do not think you understood it. That is capable of a yes or no answer.

(Question read.)

A. At the moment I would say no.

Q. Well, he did not buy any liquors in the entire month of August, from you, did he?

A. I would have to check the records.

Q. Well, will you check the records and inform us?

A. Yes, sir.

Q. Did Mr. Greenspahn, or did the defendant corporation here ever buy any Seagram whiskies or any of the

whiskies such as have been described in the complaint here, from the plaintiff corporation?

A. No, sir.

Q. Then you will say that in the month of August they never bought any of the liquors described in the complaint here from you——

A. That is correct.

Q. (Continuing.) —the plaintiff corporation?

A. That is correct.

Q. You did not?

A. You question was as to the liquors.

Q. All right. Any of the liquors described in the complaint, they never bought any?

A. That is right.

Q. They never bought any liquors from the plaintiff corporation either before or after they signed this contract of the nature described in this complaint and in this lawsuit?

A. That is correct.

[fol. 20-54] Q. But they did, in October, buy some other merchandise other than the liquors described in the complaint, from your corporation?

A. That is correct.

Mr. Breakstone: That is all, Mr. Maas. Just one second.

Q. Showing you Plaintiff's Exhibit 3, Mr. Maas, was that signature typewritten in there when the contract was signed, Old Dearborn Liquor Stores, Inc.?

A. Yes, sir.

Q. And was that typewritten signature put on there at your desk?

A. Not right at my desk. The whole document was filled out, executed, except for the signatures, the written signatures.

Q. Was all the typewriting that appears on this contract done in your office?

A. Yes, sir.

Q. I mean the company's offices?

A. Yes, sir.

Q. Was this signature, Old Dearborn Liquor Stores, Inc. put on there on the typewriter, in the plaintiff corporation?

A. Yes, sir.

PAUL PAGETT, called as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Richard Mayer:

I live at 4641 North Menard, Chicago, and am a salesman for plaintiff. For the last three or four months I have been assigned to loop territory. I have gone into the stores operated by defendant at 208 West Madison, Chicago, and 209 South Wabash avenue, Chicago, have met and talked with all of the officers of defendant. It was my duty to call upon the neighboring stores and others in the vicinity of the stores now operated by the defendant for the purpose of selling whiskey sold by defendant.

Q. Let me put this question to you: Did you personally [fol. 20-55] observe any effect at any time of the cutting of prices by the defendant at any of those stores in the loop?

A. Yes, I did.

Q. What was that effect?

A. Well, the effect was the neighboring stores—that is, I am speaking now of the liquor stores, they were hiding our merchandise and doing everything possible but to promote the sale of our product because of the cutting of the prices by the defendant.

Q. Were there any instances where stores in that neighborhood who had maintained the prices stipulated by Seagram-Distillers Corporation, cut their prices after the cutting by the defendant at its stores?

A. Yes, there were several that cut their prices to the defendant's prices, as well as those that refused to sell it, but simply hid the merchandise, refused to sell it at that price.

The Court: You will have to be specific, or it will be stricken.

Mr. Richard Mayer:

Q. Can you specify any particular places where any of that actually occurred, to your personal knowledge?

A. Yes.

Q. Name them.

A. I believe I can name a few of the stores, Joe Grein & Pahls is one. Ladner Brothers is another.

Mr. Breakstone: What was that name?
A. Ladner Brothers, and Silvers.

Cross-examination.

By Mr. Breakstone:

Q. Now, Grein & Pahls handle a large number of brands of liquor that are in competition with Seagram, do they not?
A. That is right.
Q. And what do you mean that Grein & Pahls hid Seagram's merchandise that they had in stock?
[fol. 20-56] A. I did not say that Grein & Pahls had hid their merchandise.
Q. Well, did Ladner Brothers hide their merchandise?
A. Yes, they did.
Q. Where did they hide it?
A. It was on one of the lower shelves.
Q. It was not prominently displayed, in other words?
A. That is right.
Q. But it was for sale in the store?
A. Well, yes, if a person really wanted it, why, I suppose they would sell them one, but only at the regular price.
Q. If a person went into Ladner Brothers and called for Seagrams it was there for sale, they could get it couldn't they?
A. That is right.
Q. That is true of Silvers and Grein & Pahls, isn't it?
A. That is right.
Q. When you say that do you know whether or not sales in any of these establishments were more or less at or about the time that you have testified, as the result of lower prices charged by competitors?
A. Well, I can truthfully say they were decidedly less.
Q. Well, do you know?
A. Yes.
Q. How many bottles of Seagram whiskies was Grein & Pahls selling in a day, at or about the time the defendants were selling these products at the prices they did?
A. I am not at all familiar with their sales of our products by the day.
Q. Well, by the month?
A. I am only familiar with the orders that I may receive from week to week, to replace merchandise that they had sold.

Q. It was your job to know the extent of their sales by the number of repeat orders they gave you?

A. That is right.

Q. You do not know whether Grein & Phals bought these [fol. 20-57] whiskies from distributors other than yourself, do you?

A. Well, it so happens that Grein & Phals——

Q. Do you know? That is simple?

A. Yes, I do.

Q. You do know?

A. Yes.

Q. Well, did they buy any whiskey from distributors other than yourself?

A. No, sir.

Q. They did not?

A. No.

Q. How about Ladner Brothers?

A. No.

Q. How about Silvers?

A. No.

Q. The only Seagram merchandise that any of those people ever bought came through you?

A. Came through us, our authorized distributors.

Q. I am talking about yourself.

A. All of their orders?

Q. Yes.

A. No, not all of them, in case of all of the stores.

Q. Do you know all of the distributors of Seagram products in Chicago?

A. I know most of them, yes.

Q. Do you know all of them?

A. I will not say that I know all of them, no.

Q. You do not know, then, of your own knowledge do you, whether or not Grein & Phals, and these other two concerns bought from distributors of which you have no knowledge?

A. Well, in the two cases I could say yes, sir.

Q. That they did?

A. That they did not buy from any but authorized distributors.

Q. Well, are there any unauthorized distributors of Seagram products in Chicago?

A. Not to my knowledge.

Q. To your knowledge, are there any people who are selling Seagram merchandise here who are not distributors appointed by the plaintiff corporation?

[fol. 20-58] Mr. Isaac Mayer: You mean other than retailers, I presume?

Mr. Breakstone: Yes, other than retailers.

A. That question is not quite clear.

Mr. Breakstone: Will you repeat it.

(Question read.)

A. Not that I know of.

Plaintiff rested its case in chief.

Defendant moved to dismiss complaint for want of equity but withdrew the same after the court stated that motion was to be entertained only upon the idea that defendant would present no evidence after the ruling.

And thereupon defendant, to maintain the issues on its behalf, introduced the following evidence, to wit:

Howard Blum, called as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Breakstone:

I live at 546 Cornelia, Chicago, and am president and director of defendant. I have never seen or heard of contract set forth as Plaintiff's Exhibit 3 until we were served with notice of the applications for injunction, and have no knowledge whatsoever that this contract had ever been entered into. It purports to bear the signature of Samuel J. Greenspahn, secretary and treasurer. Defendant, to my knowledge, never bought any Seagram's products of the nature described in the complaint, from plaintiff; but bought the same from the following distributors and jobbers: Pioneer Wine Distillers, Old Gold Distributing Company, Roxy Liquor Company. Pioneer and Old Gold are [fol. 20-59] distributors pursuant to contract and nomination by plaintiff, but Roxy Liquor Corporation is not. I

am not familiar with the stipulated minimum prices fixed by the plaintiff for the sale of its products or as to the sale of Seagram's products in the stores of defendant. The products which were sold in defendant's stores, as described in the complaint and in court, were not purchased from plaintiff directly, but from one of the three companies just named.

Q. Now, were the sale prices that you sold the merchandise in question at in excess of the cost prices to you of this merchandise?

Mr. Richard Mayer: I object.

A. Very largely.

Mr. Richard Mayer: I object to any such generalization. If we are going to get down to details, let us find out what happened in each instance.

Mr. Breakstone: All right. Mark these Defendant's Exhibits 11, 12, 13, and 14; mark this check Defendant's Exhibit 15, and the remaining documents Defendant's Exhibits 16, 17, 18 and 19; mark this check Defendant's Exhibit 20, and the remaining documents Defendant's Exhibits 21 to 26.

(Documents marked as requested.)

Q. Mr. Blum, I show you Defendant's Exhibits marked 12 to 14, inclusive, for examination.

A. Yes, sir.

Q. Do you recall the purchases of liquor by your corporation from the billings contained thereon?

A. Yes, sir.

Mr. Richard Mayer: I object to that, as being leading and suggestive. What this man has personal knowledge of, all right.

The Court: Read the question.

(Record read.)

[fol. 20-60] The Court: The answer may stand.

Mr. Breakstone:

Q. Did you purchase these liquors at the prices indicated thereon?

Mr. Richard Mayer: I object, until it is first shown that this man personally had these transactions, or if one of these other gentlemen connected with them had. If he had personal knowledge, it is not shown.

The Court: You can cross-examine on that.

Mr. Mayer: All right. I am making my objection, if the court please.

Mr. Breakstone:

Q. I show you Defendant's Exhibit 11. Is that your name on that check?

A. Yes, sir.

Q. I show you Exhibits 15 to 19, inclusive, for inspection.

A. Yes, sir.

Q. State whether or not your corporation made the purchases of liquors contained on the billheads contained on these exhibits?

A. We did.

Q. Did you pay for them by this check?

A. Yes, sir.

Q. Exhibit 15?

A. Yes, sir.

The Court: Let me see the billhead.

Mr. Breakstone:

Q. I show you Exhibits marked 20 to 26, inclusive, for inspection.

A. Yes, sir.

Q. State whether or not you purchased the liquors in question from the corporation Pioneer Wine Dealers, Inc. appearing on said exhibits?

Mr. Richard Mayer: The same objection.

A. Yes, we did.

The Court: Wait a minute. Do not answer when there is an objection.

The Witness: I see.

The Court: Will you read the question?

(Question read.)

[fol. 20-61] The Court: Objection is overruled.

Mr. Breakstone: What is the answer?

A. Yes, sir.

Q. Were these items of Seagram liquors appearing on these statements purchased from these respective corporations at the prices indicated on these statements?

A. No, sir. They were purchased for less.

Mr. Isaac Mayer: What is that?

(Answer read.)

Mr. Richard Mayer: Just a moment. What is that last question?

(Question and answer read.)

Mr. Richard Mayer: Are you offering these, counsel?

Mr. Breakstone: I have not offered them yet. I intend to. I want to present them to one more witness.

Q. Now, Mr. Blum, tell me, did your corporation sell any Seagram's merchandise at any time below cost of the merchandise to your corporation?

A. Never.

Q. And was this contract, Plaintiff's Exhibit 3, at any time ever presented for consideration to the board of directors of the Old Dearborn Distributing Company?

A. No, sir.

Cross-examination.

By Mr. Richard Mayer:

I had charge of the financial end of the business; and Mr. Samuel J. Greenspahn, one of the officers of the company, had charge of the buying. He was the purchaser and had full charge of the purchases of the company. He consulted with us, but it was his duties. I do not know offhand whether there were occasions when Mr. Greenspahn's [fol. 20-62] signature was the sole signature on documents signed on behalf of the company, other than the particular contract involved here. I do not know of any transaction conducted by defendant in any name other than that of Old Dearborn Distributing Company.

Q. Did your company ever operate under any trade name names, or names other than that?

A. Yes; we had our stores;—that is, we had the name on our store of Old Dearborn Liquor Stores, for the purpose of retail sales. We could not very well call each in-

dividual retail store Old Dearborn Distributing Company, but we did call the unit Old Dearborn Liquor Stores, as a retail trade name.

Q. In what way did you use that name?

A. We put it on the window for the purpose of a retail liquor outlet for our company.

Q. Was that the only place you ever put it?

A. To my knowledge, yes.

Q. Well, now, just think a little and help us out here.

A. Help me out. I can't think of any.

Q. What do you have to do in order to get a license to operate a retail liquor store?

A. Well, we have to get a license.

Q. But what information do you have to go to the State of Illinois——

A. The name.

Q. (Continuing.) —and to the City of Chicago?

A. The name of the corporation applying for the license, and the name which will appear on the windows of the store.

Q. Is that what the thing says, as you recall it, the application?

A. As I recall, that is what the application says.

Q. You recall that the application says trade name of business?

A. The name of the store upon which it operates under.

[fol. 20-63] Q. Well, just look that over.

The Court: Never mind.

Mr. Richard Mayer: All right.

The Court: I do not care about that.

Mr. Richard Mayer:

Q. Do you recall that you executed an application for a renewal license for the store at 209 South Wabash avenue, in which you answered the question, "Trade name of business" as "Old Dearborn Liquor Stores"?

A. I filled in the printed form.

Q. If you signed that application it is correct, is it not?

A. I filled in the printed form. We do not lie to the State, or City, or Government, on licenses. It must be correct.

Q. Did you use the trade name?

A. The trade name of the issuing corporation is on there, Old Dearborn Distributing Company is the corporation applying for the license.

Q. Mr. Blum, if you used the trade name Old Dearborn Liquor Stores for the purpose of getting a license that means what it says, is that right?

A. We had to put that name because we could not get a license for the stores if we had Old Dearborn Distributing Company on the window. We had Old Dearborn Liquor Stores as a retail outlet, and we had to put the name of the store on the application; that is what this space is in there for.

Mr. Richard Mayer: That is what I thought.

Q. In other words, you operated that particular store at 209 South Wabash avenue,—that is, when I say "you" I mean the company, the distributing company—under the name of the Old Dearborn Liquor Stores, is that right?

A. All of our leases were signed, "Old Dearborn Distributing Company." We operated as the Old Dearborn [fol. 20-64] Distributing Company. The name on the window was Old Dearborn Liquor Stores, a retail outlet.

Q. Selling under that name as a retail outlet?

A. That may be your impression. My impression is, you asked me what we operate under. We operate under Old Dearborn Distributing Company.

The Court: Those things will be proved by something more than a person who is not familiar with the law.

Mr. Richard Mayer: All right.

Q. Now, you have had occasion to see cards around your different stores, have you not?

A. I have not been to the outside stores for months.

Q. What do you call the "outside" stores?

A. Well, I mean the outlying stores, outside of the main store.

Q. What are the main stores?

A. 209 Wabash and Lincoln avenue.

Q. No, no.

A. The main stores, 208——

Q. What is the main store?

A. 208 Madison.

Q. You have been there daily for the past months?

A. Where?
Q. At 208 West Madison?
A. Yes, I have been there.
Q. Have you been over at South Wabash avenue during that time?

The Court: Ask him if he knows whether those cards were in his store for use.

Mr. Richard Mayer:

Q. Was Plaintiff's Exhibit 13 or any cards similar to it ever in your store at 208 West Madison street?
A. I think they were.

The Court: That is the end of that. Go to something else.

Mr. Richard Mayer.

[fol. 20-65] Q. And was a card such as Plaintiff's Exhibit 7 on display or for use in your north side store?

The Court: Is that a different one?
Mr. Richard Mayer: That is the same.

A. Well, I imagine it was; it was there. I have not been in that store for months.

Mr. Richard Mayer: All right.

Q. Is the same true with reference to the cards previously marked Plaintiff's Exhibit 2, so far as 209 is concerned?
A. Yes, that is right.
Q. That is right?
A. Yes.

The Court: May I see that card again? May I see one of those cards?
Mr. Richard Mayer: That is the north side; this is Madison. They are the same identical thing.
The Court: All a matter of names.
Mr. Richard Mayer: That is right. Just a moment.

Q. I have here Plaintiff's Exhibit 14. It looks like this was a receipt that came out of 208 West Madison.
A. That is right.
Q. Do you identify it as such?
A. Yes, that is right.

Q. And this plaintiff's exhibit, at the top there, shows, "Old Dearborn Distributing Company"?

A. That is right.

Q. "Co."?

A. Right.

Q. Plaintiff's Exhibit 18, you identify that as a receipt that comes from 209 South Wabash avenue, do you not?

A. Well, this is 209 or 3202 Lincoln.

Q. Either the north side store or 209?

A. I have no way of telling.

Q. What is the name you use up there?

A. Old Dearborn Liquor Stores.

Mr. Richard Mayer: Thank you.

[fol. 20-66] Q. And Plaintiff's Exhibit 17, that is one of your receipts?

A. Yes, sir.

Q. Where does that come from?

A. Either of the two stores.

Q. Either Wabash avenue or out of the north side store?

A. That is right.

Q. How about Plaintiff's Exhibit 9?

A. That came out of 208 West Madison.

Q. Just look at that signature and tell me if you recognize that signature.

A. That looks like Mr. Brown's. He is a left-handed writer.

Q. What is his first name?

A. Harry Brown.

Q. It looks like he signed that receipt for this boy Lloyd that we talked about this morning?

A. It looks like his signature.

Q. Can you recognize the signature on Plaintiff's Exhibit 10?

A. No, sir. I cannot.

Q. Where was that received?

A. At either one of the two stores; must be some clerk.

Mr. Richard Mayer: All right. Thank you. Can we have just one moment?

The Court: Yes.

Mr. Richard Mayer:

Q. Mr. Blum?

A. Yes, sir.

Q. You saw the original answer that was filed to this suit, prepared by Mr. Breakstone?

A. Yes, sir.

Q. You signed it?

A. I signed it, yes, sir.

Q. Did you read it over before you signed it?

A. I read it.

Q. Did you read it all the way through before you signed it?

A. I read it all the way through, yes, sir.

Mr. Richard Mayer: That is all.

Mr. Breakstone: One question, Mr. Blum.

[fol. 20-67] Redirect examination.

By Mr. Breakstone:

Q. Was Mr. Greenspahn authorized by authority of the the corporation to take out—make licenses for liquor licenses for these stores?

A. Yes, sir, he was.

Mr. Richard Mayer: I object to that.

Mr. Isaac Mayer: It calls for a conclusion.

The Court: Objection sustained. That is provable, if it is material, by the minutes, upon objection.

Mr. Breakstone: That is all.

Mr. Richard Mayer: That is all.

Mr. Breakstone: That is all, Mr. Blum.

(Witness excused.)

Mr. Breakstone: Mark this Defendant's Exhibit 27.

(Document marked as requested and offered and received in evidence.)

Mr. Breakstone: We have Exhibit 27, which is the charter of the corporation.

SAMUEL J. GREENSPAHN, called as a witness on behalf of the defendant, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Breakstone:

Q. Mr. Greenspahn, you are secretary-treasurer of the defendant corporation here?

A. That is right.

Q. You heard this witness McCray testify here a moment ago?

A. Yes, sir, I did.

Q. Did he ever hand you a copy of this price list, minimum price list or letter similar in form as that attached to the complaint here?

A. He did not.

[fol. 20-68] Q. Did you ever receive either of those documents through the mail or otherwise?

A. No, sir.

Q. Have you even seen a copy of the same until the complaint in question was served upon you?

A. No, sir.

Q. Now, referring to these exhibits of the defendant, showing you first, Exhibits 11 to 14, inclusive, which relate to the transactions between the defendant corporation and Pioneer Wine Dealers, Inc., will you examine those documents and point out the items of Seagram's products purchased from those corporations and similar to those described in the complaint?

Mr. Richard Mayer: I object to characterizing any documents by pointing out.

The Court: Read the question.

Mr. Richard Mayer: They will speak for themselves.

The Court: Will you read the question?

(Question read.)

The Court: Proceed.

Defendant is engaged in the wholesale business, selling liquor and products of similar description to those mentioned in the complaint.

The witness then identifies document marked Defendant's Exhibit 28 as the corporate minutes of defendant kept by the witness as secretary-treasurer.

Mr. Breakstone (to opposing counsel): I wonder if we could agree to put in evidence certain sections of these by-laws without reading it all into the record?

Mr. Richard Mayer: There is an objection to that that it is immaterial, irrelevant and incompetent.

The Court: They might be received subject to the objection.

[fol. 20-69] Mr. Breakstone: I want to refer specifically in that Exhibit 28 to certain sections.

The Court: I am making my ruling with the idea that you want to introduce some small part of it.

Mr. Breakstone: That is right, a small part of it. But I will introduce all the by-laws if the objection is on the contention that I am introducing a part rather than the whole.

Mr. Richard Mayer: We object to it as immaterial, irrelevant and incompetent, the whole or any part of the by-laws of this company.

The Court: As to the the business it is in?

Mr. Richard Mayer: Yes.

The Court: Whether it is wholesaler, and distributor, or sells as a retailer—I think it is competent to prove by some part of it that——

Mr. Richard Mayer: I don't understand if counsel offers it for that purpose.

The Court: It contains a copy of the charter, does it?

Mr. Breakstone: Yes, your Honor. We have the charter, but we have not offered the charter; we have had that charter identified.

The Court: Then it is not necessary on that point if you have the complete charter here.

Mr. Breakstone: One of the defenses raised by the answer is that the contract in question was executed without authority, and I want to put in sections of the by-laws, or seek to put in sections of the by-laws that set forth the powers and rights of the board of directors, and the powers given to and residing in the president, and the powers given to and residing in the secretary-treasurer, who really executed the contract.

The Court: You deny that he acted for your company.
[fol. 20-70] Mr. Breakstone: There is the question of lack of authority.

The Court: It may go in subject to the objection. In any event counsel could make the offer.

Mr. Breakstone: That will straighten it up.

I want to offer that part of Exhibit 28, setting forth in the by-laws Section 5, relating to the powers of the board of directors, Section 6 relating to the powers of the president of the corporation, Sections 8 and 9 relating to the powers of the secretary-treasurer of the corporation.

Mr. Isaac Mayer: That is objected to.

Mr. Richard Mayer: And to all and each of them.

Mr. Breakstone: And the additional power covering the minutes of the corporation, which is about five pages.

Mr. Richard Mayer: We object to that also as immaterial, irrelevant and incompetent.

The Court: I don't know what you are trying to do. Are you making the offer, to be followed by stating everything that you expect to put in? If you want to proceed under the rule of court and offer those provisions subject to the objections, you may do so.

Mr. Breakstone: Then I will offer them subject to the objections, and subject to whatever your Honor's ruling may be.

Portions of by-laws offered and received in evidence as Defendant's Exhibit "28".

Cross-examination.

By Mr. Richard Mayer:

The Witness: Defendant sells alcoholic beverages to the store located at 65 East Van Buren street, which store belongs to Howard Blum, and not defendant.
[fol. 20-71] Howard Blum is president of the defendant, and that store is also partly owned by Mr. A. N. Liebling.

Whereupon Defendant's Exhibit 1 to 28, inclusive, were received in evidence, said Exhibits 1 to 26 inclusive consisting of invoices of merchandise purchased by defendant and checks issued by defendant in payment of certain of said invoices; said Exhibit 27 being a copy of defendant's Arti-

cles of Incorporation, and said Exhibit 28 being in the following words and figures, to wit:

DEFENDANT'S EXHIBIT 28

By-Laws of Old Dearborn Distributing Company

Article II

Board of Directors

Section 5. Powers.—In addition to, and not in limitation or prejudice of, the general powers conferred upon it by the laws of the State of Illinois, by the Certificate and Articles of Incorporation, and by the By-Laws, it is hereby expressly declared that the Board of Directors shall have the following powers:

(a) To manage the business and affairs of the corporation and fix the terms, conditions, and consideration on which all, or substantially all of the assets and property of the Corporation may be sold, leased, exchanged, mortgaged, pledged, or otherwise disposed of, in the usual and regular course of the business of the Corporation;

(b) To purchase, or otherwise acquire for the Corporation, any property rights, or privileges which the Corporation is authorized to acquire, at such price or consideration and generally on such terms and conditions as it thinks fit, and at its discretion to pay therefor either wholly or partly in money, stock, bonds, debentures or other securities of the Corporation;

(c) To create, make and issue mortgages, bonds, deeds [fol. 20-72] of trust, trust agreements, and negotiable or transferable instruments and securities, secured by mortgage or otherwise, and to do every other act and thing necessary to effectuate the same;

(d) To appoint any person or corporation to accept and hold in trust for the Corporation any property belonging to the Corporation, or in which it is interested, or for any other purpose, and to authorize such person or corporation to execute such deeds and do all things requisite in relation to any such trust;

(e) To designate two or more Directors to constitute an Executive Committee and to delegate any of the powers of the Board of Directors in the course of the current business of the Corporation, not specially restricted to it by Statute, to said Committee or any standing or special Committee, or to any officer or agent, and to appoint any persons the agents of the Corporation, with such powers (including the right to subdelegate) and upon such terms as it sees fit;

(f) To designate places for the meetings of the Board within or without the State of Illinois;

(g) To appoint, and at its discretion, remove or suspend permanently or temporarily such subordinate officers, agents or servants as it deems fit, and to determine their duties, from time to time change their salaries or emoluments, and to require security in such amounts as it thinks fit;

(h) To confer by resolution upon any appointed officer of the Corporation the power to appoint, remove or suspend any subordinate officers, agents or servants;

(i) To designate who shall be authorized to sign bills, notes, receipts, acceptances, endorsements, checks, releases, deeds, contracts, and other instruments on the Corporation's behalf;

(j) To fix the salaries of all officers of the Corporation;

(k) To change from time to time by appropriate resolution, the registered office or registered agent of the Corporation, or both;

(l) To fix the consideration for which the shares of the Corporation may be issued from time to time, unless the [fol. 20-73] Articles of Incorporation reserve to the Shareholders such right;

(m) To issue calls for payment on subscriptions in such manner and at such times as it may determine; to prescribe penalties for failure to pay calls, or installments thereon subject at all times to the provisions of the law of the State of Illinois;

(n) To determine the part of the consideration received for the shares of the Corporation which shall be allocated to stated capital;

(o) To authorize the issuance of scrip or other evidence of ownership for fractional shares of the Corporation and fix the rights of the holders thereof.

Article III

Officers

Section 6. President.—The President shall preside at all meetings of Shareholders. Subject to the Board of Directors, he shall have general charge of the business of the Corporation, and shall perform all the duties usually incident to the office of President. He shall perform and carry into effect all orders and resolutions of the Board of Directors, subject, however, to the rights of the Directors to delegate any specific power, except such as may be by Statute exclusively conferred on the President, to any other officer or officers of the Corporation. He shall have the power to sign and execute all authorized bonds, mortgages, contracts, agreements or other obligations in the name of the Corporation and with the Secretary or an Assistant Secretary may sign all Certificates of the shares of the capital stock of the Corporation. Unless and until otherwise ordered by the Board of Directors, the President of the Corporation shall have full power and authority, on behalf of the Corporation, to receive and accept, and to waive, notice of the time, place and/or objects of any and all meetings of Shareholders of any corporation wherein this corporation shall be a shareholder, and, for and in the name and behalf of this Corporation, (a) to attend and vote at such meetings, or (b) by instrument of proxy to appoint a [fol. 20-74] proxy or proxies to attend and vote at such meetings on behalf of this Corporation.

Section 8. Treasurer.—The Treasurer, subject to the supervision and direction of the Board of Directors, shall have custody of all funds and securities of the Corporation which may come into his hands; when necessary or proper he shall endorse (or cause to be endorsed) on behalf of the Corporation for collection, checks, notes, and other obligations and shall promptly deposit the same and all monies and available effects to the credit of and in the name of the Corporation, in such bank or banks or depositaries, as the Board of Directors may designate, or in its failure to so

designate, then in such bank or banks or depositaries, as may be designated by the President. The Treasurer shall render a statement of accounts of the Corporation whenever required by the Board of Directors; he shall enter regularly in the books of the Corporation, to be kept by him for that purpose, a full and accurate account of all the monies received and paid by him on account of the Corporation; he shall at all reasonable times exhibit his books and accounts to any Director of the Corporation upon application at the office of the Corporation during business hours; he shall perform all acts incident to the position of Treasurer, subject to the control of the Board of Directors. If so required by the Board of Directors, he shall give a bond for the faithful discharge of his duties in such amount as the Board of Directors may specify. In the event of the death, disability, resignation or removal from office of the Treasurer, all books, papers, vouchers, money and property of whatever kind in his possession belonging to the Corporation shall be surrendered to the Corporation.

Section 9. Secretary.—The Secretary shall record all votes and the Minutes of all meetings of the Shareholders, and of all meetings of the Board of Directors, and also (unless otherwise directed) of all meetings of Committees in books provided for that purpose. He shall sign all Certificates of Stock with the President or a Vice-President. He shall, with the President or Vice-President, execute all authorized contr cts, agreements, bonds or other evidences of [fol. 20-75] indebtedness, and when so ordered by the Board of Directors of the Corporation, he shall affix the Corporate Seal thereto, and to all other documents requiring a Seal. He shall have charge of the certificate books, stock ledgers, and such other books and papers as the Board of Directors may direct, all of which shall, at all reasonable times, be open to the examination of any Director upon application at the principal office of the Corporation, during business hours. He shall attend to the giving and serving of all Notices, and he shall in general perform all the duties incident to the office of Secretary, subject to the control of the Board of Directors. He shall submit such reports to the Board of Directors as may be requested by it. In the event of the death, disability, resignation or removal from office of the Secretary, all books,

papers, vouchers, money and property of whatsoever kind in his possession, control or custody, belonging to the Corporation, shall be surrendered to the corporation.

Mr. Richard Mayer: Let me see them. I cannot intelligently address the court without seeing them.

Mr. Breakstone: I will produce them for you, here are 1 to 10, which are the invoices.

Mr. Richard Mayer: Let me see the rest of them.

Mr. Breakstone: I thought you would go through them one at a time.

Mr. Richard Mayer: I have seen those (indicating).

Mr. Breakstone: Here are 11, 12, 13, 14, 15 to 19, 20 to 26, 27 and 28.

Mr. Richard Mayer: They are each objected to, separately, on the ground that they are immaterial, irrelevant and incompetent, with the exception of the corporate charter marked 27.

The Court: Let me see that charter, please.

[fol. 20-76] Fred A. Melick, called as a witness, in rebuttal, on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Richard Mayer:

I live at 9912 South Peoria street, Chicago, and am a salesman for plaintiff. On November 16, I went over to defendant's store at 208 West Madison street, Chicago, with Mr. McCray; and I and Mr. McCray had a conversation with Mr. Samuel J. Greenspahn. I asked Mr. Greenspahn if he had received copies of Plaintiff's Exhibits 19 and 20, being a letter of plaintiff and a price list, and he stated that he had received them; and at the time of our conversation I handed Mr. Greenspahn another copy of that letter and price list. I have been a salesman for plaintiff since before August 1935, and the price list shown on Plaintiff's Exhibit 20 has remained the same since August 26, 1935, up to the present time.

Cross-examination.

By Mr. Breakstone:

Q. Did I understand you to say, Mr. Melick, that in the course of the conversation with Mr. Greenspahn he stated that he had not received the copy of minimum price list and the accompanying letter which was just shown you?

A. I stated that he received it.

Q. He stated that he had received it?

A. Yes, sir.

Q. Then I didn't understand you. O. K.

A. Yes, sir.

Mr. Breakstone: That is all.

(Whereupon Plaintiff's Exhibits 19, 20 and 21, respectively, were received in evidence. Plaintiff's Exhibit 19, [fol. 20-77] being the same as Exhibit 3 to the complaint, set forth in full at page 12, supra; Plaintiff's Exhibit 20, being the same as Exhibit 4 to the complaint set forth in full at page 15 supra, and said Plaintiff's Exhibit 21, being a Fair Trade contract dated October 23, 1935, between plaintiff and Roxy Liquor Corporation, and on a form identical with Exhibit 2 to the complaint set forth in full at page 9, supra.

STIPULATION AS TO CERTAIN FACTS

Counsel for both parties stipulated that the only stockholders' or directors' meetings shown in defendant's Exhibit 28, being the corporate minutes of defendant, were held on the following dates:

(1) January 5, 1934, the first stockholders' meeting was held.

(2) July 10, 1934.

(3) November 12, 1935.

Said meetings were joint meetings of both stockholders and directors.

It is further stipulated by counsel that defendant has continuously engaged in business including the retail sale of liquor since the date of its incorporation and that its place of business is and has been at one or more of the places named in the testimony given in this cause.

Whereupon Plaintiff's Exhibits 22 and 23, respectively, were received in evidence. Said Exhibit 22, being a Fair Trade Contract dated October 29, 1935, between plaintiff and Old Dearborn Liquor Stores, Inc., on a form identical with that attached to the complaint as Exhibit 2 thereto, and set forth in full at page 9, supra; and said Plaintiff's Exhibit 23 being a Fair Trade contract dated October 29, 1935, between plaintiff and Pioneer Wine Dealers on a form identical with that attached to the complaint as Ex-[fol. 20-78] hibit 2 thereto, and set forth in full at page 9, supra.

Plaintiff rested its case.

Mr. Richard Mayer made his opening argument to the court.

Mr. Breakstone, of counsel for defendant made his reply argument.

Mr. Isaac Mayer: I presume counsel will concede that the defendant has been advertising these cut prices since this case has been pending here, and if you will please show me that advertisement, I will offer it in evidence and let it be marked as an exhibit.

Mr. Breakstone: We admit that.

Mr. Isaac Mayer: I also offer in evidence a photostat of the window front at 208 West Madison street, Chicago.

Mr. Breakstone: I admit that. That will be your exhibits 24 and 25.

(Said documents, so marked as Plaintiff's exhibits 24 and 25, were thereupon received in evidence. Said Exhibit 24, being a photograph of the front of defendant's store located at 208 West Madison Street, Chicago, Illinois, showing defendant's advertisements of Seagram's products at prices less than those stipulated by plaintiff; and said

Exhibit 25 being an advertisement published by defendant in the November 25, 1935 issue of the Herald & Examiner and which is in words and figures as follows:

PLAINTIFF'S EXHIBIT 25

(Here follows one photo, side folio 20-78½)

Headquarters for Thanksgiving Liquors

OLD DEARBORN LIQUOR STORES *Protects* CHICAGO'S POCKETBOOK!

Reprint from Chicago American, November 21.

OPEN SEAGRAM PRICE CUT SUIT

Judge Rush of Circuit Court today started hearing the injunction petition of the Seagram-Distillers Corporation against the Old Dearborn Distributing Corp., which it charges with cutting prices in violation of the Illinois fair trade acts. The Old Dearborn concern operates stores at 208 W. Madison st., 209 S. Wabash av. and 3202 Lincoln av. Seagram's charge Old Dearborn advertised its brands of liquors from a few to 90 cents below established minimum prices

PAY NO MORE FOR GENUINE

Bottled in Bond

Seagram's

None to Dealers Sold

$1.99 PT. Regular $2.47

V. O. 6 YEAR OLD WHISKEY

"Old Dearborn" is determined to give their thousands of valued customers CHICAGO'S LOWEST PRICES on every brand of whiskey. We believe that price fixing is un-American and unnecessary, and decline to accept any standard of prices other than our own.

"Old Dearborn" CANNOT agree to price fixing—to a raiding of the public's pocketbook! At $1.99 pt. we enjoy a fair profit on Seagram's, and you SAVE real money.

COME TO THE "OLD DEARBORN" STORE NEAREST YOU, OR PHONE FOR FREE DELIVERY.

BUY SEAGRAM'S V. O. FOR THANKSGIVING AT "OLD DEARBORN," at $1.99 pt. Pay No More!

Regular $4.79 **Qt. only $3.93**

FREE DELIVERY
2 bottles or more.
Right reserved to limit quantities.

Cut Prices on Famous Brands

OLD DEARBORN
16 months old, 100 proof Straight Kentucky Bourbon.

97c pint · 50c ½ pint · $1.89 quart

Hiram Walker's Bourbon
Famous brand 7-yr. old, bottled in bond, pt., ... $1.69

TAYLOR WINES
Aristocrat of all wines, sweet and dry, fifth, ... 97c
$1.45 qt. decanter

Chicago's Lowest Prices
Hillcrest Gin, 90 proof, London Dry Distilled by Hillcrest Distilling Co., a subsidiary of Seagrams.

58c pint · 35c ½ pint · 87c fifth

Teacher's Highland Cream
Imported Scotch Whiskey, fifth.... $2.89

Special "Old Reserve"
16-yr. old Bourbon, bottled in bond, pt., ... $2.49

Old Dearborn LIQUOR STORES

DIVISION OF OLD DEARBORN DISTRIBUTING CO., INC.

208 W. Madison St.	209 S. Wabash Av.	65 E. Van Buren St.	3202 Lincoln Av.	1696 W. Belmont Av.
Dearborn 1770	*Web. 1477*	*Web. 2646*	*Buckingham 1770*	*Buckingham 1770*

Phone Your Nearest "OLD DEARBORN" Store for Free Delivery for Thanksgiving

[fol. 20-79] COLLOQUY

Mr. Isaac Mayer: There are a couple of witnesses who will testify to these facts, that should be added to the testimony here, that persons handling a Seagram product, and particularly with respect to those which the defendant has been cutting prices on, have notified the plaintiff that they will withdraw their merchandise from sale, and not try to push them; asserting that they cannot compete with those prices, and that unless the plaintiff does something for them they will have to discontinue handling those goods.

Do you concede that?

Mr. Breakstone: We will concede that those witnesses, if called, will swear to that, will so testify.

Mr. Isaac Mayer: They are in court now, and are ready to testify.

Mr. Breakstone: I concede that they so testify.

Mr. Isaac Mayer: There were five examples——

Mr. Richard Mayer: There were seven.

Mr. Breakstone: That is agreed.

I will now proceed with my argument.

ARGUMENT OF COUNSEL

Mr. Isaac Mayer: * * * (Continuing argument): In this case, the attitude of the defendant, your Honor, is such as to show a violent disregard of what we believe to be our rights, and the plaintiffs do not see how they can be protected unless your Honor will enter an immediate injunction. We have prepared a short decree to that effect.

The Court: Assuming that the statute is all right, and the contract is all right, which I really believe are all right, but if there is anything doubtful about them, another court ought properly to pass upon it—I think you are right in the idea that you have a right to relief, but the relief in [fol. 20-80] my opinion must be at common law. There will be no difficulty in proving the amount sold to the defendant. For those amounts he has to pay the retailer price, if not the $50, for each time he made a sale. The recovery will naturally and necessarily be the difference between the price that the products should sell for and what he did sell it for.

There is this difficulty about specific performance which you are seeking. It would, in my opinion, be converting a

proper lawsuit for proper damages into something like criminal punishment for every time he violates the contract. For instance, he violates after an injunction is granted, and the Court punishes him for contempt. Nothing like that seems to be contemplated by the contract.

Specific performance is one of the most extraordinary remedies known to the law. It is not a remedy of right, it is a remedy in the discretion of the Court, and while I am much impressed by the argument of counsel both along the matter of price fixing, the authority of the state thereon, and the matter of harm to his business, to the business which he advocates as having these rights, I am fairly convinced that he will obtain his remedy very substantially by his recovery at common law. If the new practice act gives me that power—I hardly think it does where the suit is one based upon the remedy and has no other equity features for its jurisdiction—perhaps I have to turn him over to the law side of the Court. But I say, I think he has a remedy, and a good remedy. He can trace the sales, he knows how much they are, the prices have to be paid, the resale prices, and I think it will be rather effectual and complete as a remedy.

Mr. Richard Mayer: May I make this suggestion, if the [fol. 20-81] Court please. We are here balancing equities before the equity side of the Court in a matter which as we get hardened to the problems of the law we sometimes overlook the situation as it is presented to the business interests involved on both sides. There is no attempt to restrain the defendant from selling his property at any price he feels he desires to do so, excepting when he cuts, and in addition to that property, is using our name. We are not concerned with an attempt on the part of the defendant to sell Seagram's V-O without Seagram's label on a bottle. We are not trying to stop him even from selling——

The Court: We aren't reviewing the case. Counsel has argued that very carefully.

Mr. Richard Mayer: May I suggest, your Honor, forget the availability here in an Equity Court of requiring from the complainant in this case the giving of any bond that will be protective to the defendant; but how can the Court, from the showing in this case, leave the plaintiff in a position where the defendant may be unable to answer in dam-

ages to the complainant. Requirements can be insisted upon, as far as the complainant is concerned, that will be protective of the defendant, if the Court please.

The Court: Counsel, I have no doubt that you are very sincere in seeking this remedy, because it is tremendously effective. You know it would be; but to apply it in a case of this kind when much discretion is used by the Chancery Court seems really ridiculous, that remedy. That's not the word I would like to use. It lessens the dignity, and you might say the unusual character of this remedy, to use it [fol. 20-82] in a case where the only damage is selling for less.

Mr. Richard Mayer: Will the Court indulge me a few moments' time on one particular confined phase of this case?

The Court: Yes.

Mr. Richard Mayer: I recognize your Honor's zealous concern about restricting the use of the injunction relief that is available in a Court of Equity, but I also realize, if the Court please——

The Court: You realize this—that from a mere breach of contract that does harm you, and therefore justifies recovery and damages, you would turn this into a criminal act, because the Court would punish him by a contempt fine and stick him in jail for breaking this contract.

Mr. Richard Mayer: Now, if the Court please, we are met in the discussion of a problem that has not had the attention of our highest court. We are all of us hopeful of a decision at an early date, but now let me point out to the Court the situation that will result in the interim between now and two or three or four months from now when the decision is finally passed upon above—that the demoralization and the disorganization of the entire attempt to properly sell our products in this community will result for this reason—we can't sell a pint bottle of 5-Crown whiskey, our distributor, one of the twelve, can't sell a 5-Crown pint for a dollar and one cent per pint to a retailer, although there are general agreements throughout this community to that effect to-day, if one or more, particularly in an instance where a person has agreed not to do so, can between now and the time of a final decision in a reviewing court, dispose of to the consuming public [fol. 20-83] for 99¢, or less than the retailer is purchasing,

so that for the period of delay until a final decision by the Supreme Court——

The Court: Well, you will have a decision now that ought to be some aid against these practices from me. I would use my office if I could to give you a speedy jury trial in a law court, and I would say that if I was trying the case and this proof was as it is here, I would instruct the jury—of course, the validity of the statute and the contract being assumed.

Mr. Richard Mayer: We have a prayer in our bill for such other relief as to the Court shall seem just in this particular complaint, and we are in a court of equity.

The Court: I would give it to you if it wouldn't involve—you see, it must have a jury.

Mr. Isaac Mayer: How would we measure the damages, your Honor?

Mr. Breakstone: I can answer that.

The Court: The quantity—for instance, every case sold; you know what it should resell for.

Mr. Richard Mayer: The Court said as to the damage a few moments ago, and I pointed out to the Court this morning that, in addition to other violations of the agreement, that the effect of the advertisement in yesterday morning's Herald & Examiner——

The Court: Which was very impudent, and if I could do anything about it I would.

Mr. Richard Mayer: Let us forget the impudency of the particular advertisement and see the effect upon plaintiff's business, and see if the Court and ourselves can estimate how to control and portect against it.

[fol. 20-84] The Court: It is partly for that reason that I give you my decision to-day instead of taking it under advisement and having you miss maybe the Christmas cheer of people in general.

Mr. Richard Mayer: The only point of difference between the Court and ourselves at the moment seems to be the method that a Court of Equity——

The Court: The specific performance of this contract is accomplished by an injunction, and that is the way negative covenants are specifically performed, and that part you know I feel of confidence you are not entitled to.

Mr. Isaac Mayer: May I make a suggestion, your Honor? I do it reluctantly because I know your Honor has given

careful consideration to this. Perhaps we didn't sufficiently emphasize it, and I think we can do so if the Court would give us an opportunity to show to you that the relief to be granted against unfair competition is always by injunction, and if your Honor will let this go over so we can show you these authorities——

The Court: I know there are many authorities both ways.

Mr. Richard Mayer: I don't think there are any the other way on that particular point, if the Court please.

The Court: I am going as far as I will on a contract of this kind, and I think you are not without considerable aid in what I consider a fair contract, as settled by statute, but I wouldn't like to be subjected to the barrage of the different decisions about specific performance cases.

Mr. Isaac Mayer: That is just what I would like to ask. [fol. 20-85] The Court: I know you can present many on one side and many on the other.

Mr. Isaac Mayer: The statute itself really answers that. It says, "Such party is guilty of unfair competition, and is actionable at law."

Mr. Breakstone: Well, the Court gives you the remedy at law.

The Court: In that specific thing, they can't tell us what remedy we shall apply, and I don't think——

Mr. Isaac Mayer: Would your Honor be willing to do this—to give us an injunction upon condition that we appeal immediately, because when you come to measure the harm done we give a bond, of course, in appropriate penalty.

The Court: Appeal immediately. You have the advantage of an open hearing.

Mr. Breakstone: I will aid and assist them to get their appeal up there immediately.

The Court: But you have got the advantage of a decision on that.

Mr. Isaac Mayer: The only trouble is that we haven't got the relief.

Mr. Breakstone: All you have to do is stop those distributors from selling their merchandise to these people.

Mr. Richard Mayer: Will the defendant desist?

The Court: Well, he ought to.

Mr. Richard Mayer: Unless this Court tells him to we can't control what he does.

The Court: Well, he is going to pay the damages.

Mr. Isaac Mayer: There is no amount of damages, your Honor.

Mr. Breakstone: $50 a sale, $300 on those six sales; they would bankrupt us in no time if they insisted on their rights.

[fol. 20-86] The Court: I am thinking of the legitimate damages. The jury always gives more, you know.

Mr. Breakstone: I know that is dangerous.

The Court: They have to pay the resale price.

Mr. Isaac Mayer: Will your Honor leave it open so that we can consider whether we want to amend that bill by alleging solvency?

Mr. Breakstone: The case is closed, isn't it?

The Court: Yes, I will not give this remedy.

Mr. Isaac Mayer: I understand that, but will your Honor just let this matter remain open until to-morrow morning, so that we can conclude what step we want to take next?

The Court: I won't enter the judgment. I won't enter any decree until to-morrow.

Mr. Isaac Mayer: You might make that Friday, if you want.

The Court: All right, Friday.

(November 30, 1935.)

Mr. Richard Mayer: If the Court please, I would like to put in some additional evidence.

Mr. Breakstone: For the purpose of the record, although I know it is within the sound judicial discretion of the Court to hear additional testimony, if the Court so decides, but this is a surprise to us, that additional testimony is to go in, and we have no knowledge, and no means of knowing what testimony is to be put in.

The Court: If it develops that you should have a continuance, you will get it.

Mr. Breakstone: All right, your Honor.

[fol. 20-87] A. MARCO, called as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Richard Mayer:

I live at 5028 North Hermitage Avenue. I am in the liquor business and operate a store in Chicago, the Marco Liquor Company at 157 North Wabash Avenue. I have been operating that store since the first day of repeal, December 5, 1933. I have an investment of about $80,000 in the business I am operating there. I know the Old Dearborn Distributing Company, defendant in this case. I recall stores they operate on Madison Street, Wabash Avenue and Lincoln Avenue, they have cut prices on Seagram's merchandise below the price set by the Seagram-Distillers Company in the City of Chicago. I have dealt in Seagram's V-O, Seagram's 5 Crown blended whiskey, Seagram's 7 Crown blended whiskey, and other Seagram products. I purchased the Seagram's liquor sold at my store through Bloom and Company. During the month of November I purchased 144 cases.

Up to November 29th our purchases of Seagram's merchandise are 14 cases in comparison with 144 cases a year ago. I noticed the advertising of Old Dearborn Distributing Company on Monday, November 25, 1935, Plaintiffs' Exhibit 25. The week before this "ad" appeared we sold about four or five pints of V-O per day, since the advertisement it dropped to nothing, probably a pint a day or every other day. Prior to this advertisement we sold a little more Seagram's 5 Crown blended whiskey than V-O, probably one-half case or less. Prior to the "ad" we sold eight or ten [fol. 20-88] pints of Seagram's 7 Crown blended whiskey per day. Since the "ad" we sold two or three a day and some days less. I have four clerks working in my store. I had customers come into my store since the "ad", probably six customers referred to this "ad", on two or three days thereafter its appearance. They came in and asked us how much is your V-O a pint, and our price being $2.47 they would say, "All I have to do is walk two or three blocks south of you and buy for $1.99." We just let them walk out, we did not meet these competitive prices. I talked to six or eight customers personally.

There is an association of retail liquor package stores in Chicago; Illinois Retail Liquor Package Stores of Chicago, Inc. It consists of about 90 per cent of the exclusive liquor store dealers of this community. There are about 125 members. I am the president of this association.

Price cutting has demoralized the sale of Seagram's products in practically every decent liquor store.

(Objections of Mr. Breakstone to this testimony overruled by the Court.)

The board of this liquor package store association meets about three or four times a month, but the entire membership once a month. In these meetings discussions took place concerning the conduct of the Old Dearborn Distributing Company. It does not belong to our association. Its store at 209 South Wabash Avenue is about three blocks away from our store on the same side of the street.

We are now selling about 14 per cent of Seagram's products of what we did a year ago. It is due to price cutting.

[fol. 20-89] Cross-examination.

By Mr. Breakstone:

I rceeived a copy of the telegram, Defendants' Exhibit 29. I did not receive a copy of Defendants' Exhibit 30. I knew this suit was pending prior to receiving a copy of Defendants' Exhibit 29, the telegram. We discussed this case in our meetings, among our retail liquor dealers during the course of this trial. The meeting was held at the Sherman Hotel on Tuesday. In our association we try to do everything in our power to help stabilize prices in this market. That is part of the function of our association. Our by-laws do not provide for price fixing.

I was not subpœnæd to come here. I came as a volunteer. I first discussed the matter of the testimony I was going to give here on the stand with the plaintiff's attorney. I went to Mr. Mayer's office with Mr. McQuade. I first talked with plaintiff's attorneys yesterday. I called McQuade after I received this telegram and he made an appointment to take me to plaintiff's attorney's office. The general demand of the public for products labeled with the Seagram's label has declined in Chicago because of price cutting.

We do not push the sale of Seagram whiskeys now. We found in the face of the price cutting of the various "ads"

that had been in the newspapers that the public knows about, we make no attempt to sell it because we are so far out of line that our consumers get the impression that we are high on everything.

We first noticed a decline in the sale of Seagram's products when a certain organization put an "ad" in the paper cutting the price to 93c about a year ago. This was the [fol. 20-90] Goldblatt stores. Our sales declined progressively for the last year in the sale of Seagram's merchandise. I am not a distributor of Seagram's products; we have not signed one of these Fair Trade Agreements with the Seagram Distillers Company. I buy all merchandise from their distributor. I have not signed any retail sales contract either. I have no trouble in getting Seagram's merchandise. My reputation is such that I am not in any category of price cutters, and accordingly it was not necessary for them to ask me to sign a contract, but if they asked me I would have signed.

I can get all the Seagram's merchandise that I want from their distributors. I have no difficulty in getting their merchandise.

Redirect examination.

By Mr. Richard Mayer:

Mr. Breakstone: I am perfectly willing to stipulate that if the representative of the Monroe Wine & Liquor Company, operating a retail store at 175 West Monroe Street, Chicago, Illinois, were called as a witness, his testimony would be substantially the same as Mr. Marco's and that of the witnesses in the court room now. I make the same stipulation as to the other witnesses, that is, the Mid-West Liquor Company, 11 South Kedzie Avenue, with the same objections as to the compiling of the evidence.

Frank R. Schwengel, called as a witness on behalf of the plaintiff, testified as follows:

I am a brigadier general in the Illinois National Guard. I live at 2844 Logan Boulevard, Chicago. I am vice-president of Seagram's Distillers Corporation, the plaintiff in this [fol. 20-91] case. The executive offices of the plaintiff com-

pany are in New York City. I am vice-president and a director of the plaintiff and have been with the company since its organization in January, 1934. Prior to my connection with the plaintiff, all through life, with the exception of three years in the army service, my business experience has been in advertising and merchandising accounts, with the exception of a period of about eight months immediately following the war when I was representing a banking group. I am fifty years old.

With reference to Seagram's products handled by the plaintiff, Government taxes, that is duties, import taxes, excise taxes, internal revenue taxes, state taxes, represent, depending upon the product, from 40 per cent to 60 per cent of the total cost. Six-year old whiskey for which we get $16 at the plant, bonded whiskey, there is added to that $21.50 in taxes plus state taxes in Illinois of $1.50, a total of $23, on top of the $16 item, so that in that case it represents more than that amount; that is bonded liquor of the type of V-O. I know the Illinois legislature has enacted a Fair Trade Act.

Our company is licensed to do business in Illinois. It operates under the Fair Trade Act in the State of Illinois completely. In the course of the sales and distribution of Seagram's products in the State of Illinois and elsewhere, I have had personal experience in connection with price cutting and its effect upon the sale of the articles manufactured by the Seagrams people and in the Seagram's products. Our business since November 15th, has absolutely stopped. There is a buyers' buying strike, and cancellations of orders [fol. 20-92] in our business this month is, with one day to go, 81 per cent less than last year; and I should say about one-third of last month when it should show us in that period an increase, based again on our experience in this market of at least 200 per cent over last month. The three biggest liquor selling days in the year are Thanksgiving, Christmas and New Years. They represent the real buying season when people very actively buy liquor. In the Thanksgiving season this year outside Illinois our business shows an increase for November nationally even including the loss we have taken in the Chicago market,—the only place we show a loss,—the increase is 200 per cent greater than in October.

Our business has gone down 81 per cent in Chicago from last year and about one-third of the volume that we got during October which is usually regarded as a normal month, this month in the Chicago territory we have been denied the

benefit of the best season of the year, and at a time when we are throwing into the market a great deal more advertising, and a great deal more money in attempting to service retailers on the point of purchases and the display of materials. I have national experience with the immediate effect of price cutting on our merchandise. I have observed it in the State of Illinois and in the City of Chicago. It has been detrimental, it hurts in this way: the moment a price cutter attempts to take advantage of the prestige or advertising of a line of goods such as Seagram's, and makes it—follows through the well known racket by making that item a loss leader, which means that he sells it at a lower price than say the small independent merchant can buy it at, it prompts the legitimate, honest merchant, who pays his rent, [fol. 20-93] and wants to have a credit standing, to hide the goods, because unless he offers it at the same price the public will soon regard the honest merchant as being a high priced man, over priced in every line, and they will pass up his store. So that the direct effect of price cutting is for all other merchants to hide the goods and to say, "We are out," and very often in protecting themselves they say, "Well, this item is not as good as it used to be," so that he can sell another item on which the price has not been cut. It leads to a general substitution and panic on the part of the real merchant, because he knows he has invested in those goods money representing from 40 per cent to 60 per cent of the value, and that that loss is irretrievable because he cannot get his taxes back from the Government or the state, and he cannot afford to take that loss. Again it means that there is a general suppression of the line on the part of the honest merchant when a price cutting is made and advertised. This all applies to the situation in the City of Chicago. It applies to the period following the 15th of November to date, here in Chicago.

Our orders have absolutely dropped. I, personally have endeavored to influence distributors and some retailers to buy goods and their answer is "No". The reason assigned is that "that we can make no profit on Seagram's; that we cannot meet the competition of the price cutting of the defendant."

Cross-examination.

By Mr. Breakstone:

I am responsible for the Chicago office. Mr. McQuade is in direct charge but I am responsible for it to the home office. I am the executive vice-president of the Seagram-[fol. 20-94] Distillers Corporation. I am consulted as to the policy pursued by the local office. Their accounts conducted under and pursuant to the decision or policy are approved by me. I never saw Defendant's Exhibit 29 before. I do not know whether or not Defendant's Exhibit 29 was sent out by the plaintiff.

Mr. Isaac Mayer: There will be no objection if we know what it is (referring to Defendant's Exhibit 29 and its proposed introduction into evidence; Exhibit 29 being a telegram sent by plaintiff).

Mr. Isaac Mayer: Some telegram to that effect was sent out; whether that is verbatim ad literatim, I do not know, but there is no objection to your offering it in evidence. (Referring to Defendant's Exhibit 30.)

Mr. Richard Mayer: A copy of this was intended to be sent out and is in possession of the plaintiff.

Mr. Isaac Mayer: (Referring to Defendant's Exhibits 29 and 30.) There is no objection to them being offered in evidence.

Mr. Breakstone: I offer them in evidence as Defendant's Exhibits 29 and 30.

(Thereupon Defendant's Exhibits 29 and 30 were introduced in evidence without objection and are as follows:)

[fol. 20-95] DEFENDANT'S EXHIBIT 29

(Western Union Telegram)

Received at 2655 N. Clark St., Chicago, Ill.

Diversey 4321.
1935 Nov. 26 PM 10 35.

CAF496 75 DL—Chicago Ill 902P
Goldblatt Bros Inc—
3149 Lincoln Ave—

Warning Stop Seagram Price Policy Upheld Stop Judge G. Fred Rush of the Cook County Circuit Court in Finding

a Retailer Guilty of Cutting Prices on Seagrams Products Today Held Seagrams Fair Trade Contracts To Be Valid And That The Illinois Fair Trade Act Is Constitutional Judge Rush Also Held That Seagrams Required No Injunction To Restrain Price Cutting Because Seagrams Was Sufficiently Protected By Its Clear Right To Recover Damages From The Price Cutter—

Seagram Distillers Corp.

DEFENDANT'S EXHIBIT 30

(Being on an enlarged form of a Western Union Telegram Blank)

Check 75 DL.
Acct'g Infmn. Charge.
Time Filed 9:05 PM.

Chicago Illinois November 26 1935.

To All Illinois Liquor Dealers

Warning Stop Seagram Price Policy Upheld Stop Judge G Fred Rush Of The Cook County Circuit Court In Finding a Retailer Guilty Of Cutting Prices On Seagrams Products Today Held Seagrams Fair Trade Contracts To Be Valid And That The Illinois Fair Trade Act Is Constitutional Judge Rush Also Held That Seagrams Required No Injunction To Restrain Price Cutting Because Seagrams Was Sufficiently Protected By Its Clear Right To Recover Damages From The Price Cutter

Seagram Distillers Corporation.

[fol. 20-96] The Witness: Before I left our New York office we received a telegram in effect quoting the telegram supposed to be sent out by the Chicago office. There are two schools of economics on the question of whether or not price cutting is good or bad. There is disagreement on the subject. All I know is this; that the Illinois legislature approved a Fair Trade Act, we were asked to operate under it. We conformed to the law, and find in our experience that those laws will supply protection to the manufacturer but are mainly in the interest of the small independent merchant, for the reason that while we have subscribed to the Illinois Fair Trade Act, while it benefits us, it benefits mostly the retailer and the distributor.

Price cutting is mostly destructive to the merchants. In effect it might easily increase the manufacturer's business, but in the end it destroys the retailer. Sometimes the manufacturer would benefit by price cutting by the largely augmented sale. Wherever there is a Fair Trade Act and the manufacturer does not conform to it, he is crucified by the retailers, so it injures us materially, and destroys our business in Illinois, because we are powerless, and for that reason appealed for relief at this time in behalf of the losses we are suffering as well as the losses the retailers are suffering. Seagram-Distillers Corporation is purely a selling corporation, employing nothing but salesmen and warehouse men. We are purely a sales company. We have no distilleries in Illinois. None of our affiliated corporations operating as distillers carry on distilling in Illinois. All the products that are disposed of in Illinois are brought in from Indiana and Maryland usually. The consumer does not benefit by the sale of our merchandise below the stipulated price.

[fol. 20-97] Price cutting is a form of racket that leads to substitution; it is merely a trick to get people in and offer them goods at a higher price based on quality; that is in merchandising circles the advantage of price cutting and it is going out of the picture very fast as a merchandising trick. Chicago is the hotbed of price cutting and hundreds of honest merchants in Chicago are asking relief.

They sometimes call price cutters chiselers, but racket is a generic term. Price cutting is a form of racket, using the generic term. I use the term innocently, not viciously.

The best of the 5 Crown whiskey is four years old. 5 Crown and 7 Crown are a blend. The other stuff used in the blend may be a year old or two years old. 7 Crown has a high old whiskey content. Four year old bonded whiskey is the base of both the 5 Crown and the 7 Crown. 5 Crown is considered the finest medium priced whiskey; but it is the cheapest product produced by Seagrams. 7 Crown is higher priced high quality whiskey. Seagram's Ancient Bottle is the very finest whiskey available, bonded whiskey. It is six years old bottled in bond. This Ancient Bottle is six years in the height of its maturity. It is in full bloom. Any older whiskey, and we have whiskeys up to thirty years old, becomes woody. They go through too long a stage in the wood and contain poison. Six to eight year old whiskey is the best that can be obtained.

The plaintiff corporation was formed in late December of 1933 or early part of January, 1934.

We have been in business here not quite two years. Seagram's products are in highest demand right to-day nationally. We were the last ones to come into the market. [fol. 20-98] We could not get into this market because of our competitors. It took us time to form an American organization. When we came into the market in January we could make no headway. The biggest demand for Seagrams is to-day at the height of the competition when everybody else has more whiskey to supply than we have. Our competition is at its heaviest to-day and yet we sell 30 per cent to 50 per cent of the bonded whiskey in America and in Chicago, Illinois. Our business is at a standstill, though our competition is at the high point to-day. Everybody has taken advantage of Seagram's embarrassment purely because of the local situation.

We are not suffering from competition in this market any more than we are in any other market. We are suffering now in the same relations that we are suffering anywhere. We have the same competition everywhere except due to the present local condition with respect to price cutting. Our opportunity for selling our goods has been destroyed.

I inspect a certified copy of the statement taken from our general books every day. Our corporation tries to get retail sales contracts of the nature of Exhibit 1 in this case signed by everybody we do business with. We permit our distributors to sell retailers who have not signed any such contracts, pending the signing of same. It takes time to get all these contracts signed up.

Redirect examination.

By Mr. Richard Mayer:

V-O is six years old. We have Ancient Bottle which is six years and some five years old. When we first brought it out it was five years old.

Mr. Richard Mayer: That is all.

The Court: Any further evidence?

[fol. 20-99] Mr. Richard Mayer: No, your Honor.

The Court: Any further testimony, Mr. Breakstone?

Mr. Breakstone: No further testimony.

The Court: You may have your injunction. I do not wish to hear any more argument.

Certificate to report of trial proceedings by Court.

Stipulation to incorporate original report of trial proceedings.

Clerk's certificate.

Irving Breakstone and Irving Greenspahn, Attorneys for Defendant and Appellant.

[fols. 21–25] IN SUPREME COURT OF ILLINOIS

Docket No. 23475—Agenda 27—April, 1936

THE JOSEPH TRINER CORPORATION, Appellee,

v.

CARL W. MCNEIL, Appellant

OPINION—Filed June 10, 1936

Mr. Justice WILSON delivered the opinion of the court:

This is a proceeding instituted by the plaintiff seeking relief under the provisions of the Fair Trade act, approved July 8, 1935. (Ill. State Bar Stat. 1935, p. 3091; Smith's Stat. 1935, p. 2893.) The title of the statute expresses its purpose as "An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade-mark, brand or name." Section 1 provides:

"Sec. 1. No contract relating to the sale or re-sale of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not re-sell such commodity except at the price stipulated by the vendor.

"(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such

purchaser agree that he will not, in turn, re-sell except at the price stipulated by such producer or vendee.

"Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

"(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

"(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

"(3) By any officer acting under the orders of any court."

There appears to be no serious contention that the act, up to this point, is invalid and unenforcible. We are particularly concerned with section 2, which declares that "willfully and knowingly advertising, offering for sale or selling [fol. 26] any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." The third section provides that the act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or re-sale prices. The Fair Trade act thus permits vertical re-sale price maintenance, but condemns, as do the Federal and State Anti-trust laws, horizontal arrangements for fixing prices. The act prescribes no criminal penalties.

The facts upon which this action is predicated are not in dispute. Schenley Distributors, Inc., licensed to transact business in Illinois, is the sole sales agent and representative in this State for certain liquors and alcoholic beverages manufactured by several affiliated distilleries known as the Schenley distilleries. "Old Quaker" is the brand name of one of the Schenley products, and the name has

been duly registered as a trade-mark with the United States patent office. Affixed to each bottle of Old Quaker is a distinctive label, upon which appear the figure of a Quaker standing before a sheaf of grain, a sack of malt, and three barrels marked "Old Quaker Whisky." Above the picture is the legend, "Bottled at the Distillery. Old Quaker. Reg. U. S. Pat. Off. Brand." The name "Old Quaker" appears in bold lettering. Below the picture there is this statement: "One pint. Straight bourbon whisky. Distilled and bottled by the Old Quaker Company. Distillers. Lawrenceburg, Indiana. Division of Schenley Products Company." The whisky has been sold and retailed under the trade-mark which definitely designates the brand and has become well known to the trade. This brand is detailed at $1.89 per quart, 98 cents per pint and 50 cents per one-half pint. These prices, under existing conditions, appear to be fair prices when considered with like commodities.

The method of merchandising Old Quaker, as set forth in the complaint, is as follows: Schenley Distributors, Inc., the sales agent, sells to ten wholesale distributors in Chicago, one of whom is the plaintiff, suggesting to these local distributors a minimum retail price which it fixes as the uniform retail price for Old Quaker and each of the other brands of Schenley products to be sold in Chicago. This price is the uniform and standard Schenley retail price. If a distributor sells to a retailer who is known to sell below [fol. 27] the Schenley list price, Schenley Distributors, Inc., refuses further to sell Schenley products to such distributor. The distributors, in turn, refuse to sell Old Quaker, or any other Schenley product, to any retailer in Chicago except on the condition that such retailer will not sell below the uniform Schenley retail price. To that end the plaintiff and the other local distributors make all sales of Old Quaker or other Schenley products under agreements of sale denominated "Fair Trade Agreements," which expressly provide that the retailer will not re-sell in the city except at the uniform and standard Schenley retail price. From the allegations of the complaint it further appears that as a direct result of the trade policy and practice described, approximately eighty-five per cent of the retailers of Schenley products in Chicago consistently maintain the Schenley retail price list for Old Quaker and other Schenley brands.

The Joseph Triner Corporation, the plaintiff, is a domestic corporation engaged in business in Chicago as a wholesale distributor, selling to retailers for re-sale in that city various brands of liquor and alcoholic beverages of standard quality. On November 8, 1935, it brought an action in the circuit court of Cook county to restrain Carl W. McNeil, the defendant, a liquor retail dealer, from selling Old Quaker whiskey in the Chicago district at prices less than those provided in the fair-trade agreements previously mentioned. From the allegations of the complaint, which the defendant by his motion to dismiss admitted to be true, it appears that the plaintiff was also operating pursuant to the trade policy and practice by which the Schenley Distributers, Inc., sought to maintain the prices specified in the fair trade agreements.

The complaint charges that a few vendors of liquor at retail in Chicago pursue a practice of "cutting" the prevailing retail price of brands of liquor which have acquired widespread attention and public favor. These retailers, it is charged, sell the popular brands at prices conspicuously lower than the prevailing price and at a loss or scant return to themselves, for the purpose of attracting the public to their stores and selling other brands of liquor or general merchandise at prices sufficiently high to meet the loss and assure a general profit. The use of "leaders" in this familiar form of price-cutting is asserted to cause irreparable loss not only to the producer of brands sold at the cut-price and to the distributors of such brands but also to the ultimate consumers or general public.

The plaintiff, at the time of filing its complaint, had established a substantial and profitable business in selling at [fol. 28] wholesale Old Quaker and other Schenley products in Chicago. A valuable asset of its business is the good will of the retailers who purchase from it for re-sale in the city the various brands of Schenley products, including Old Quaker. Similarly, the good will of the public and consumers who purchase such products is deemed an important asset. According to the complaint a uniform price assures the retailers comparative immunity from injurious price-cutting by other retailers and a reasonable profit upon their retail sales.

In October, 1935, the defendant, with full knowledge of the fair trade agreements entered into by the plaintiff and

the other local Schenley distributors with substantially all the retailers of liquor in Chicago, threatened to sell, offer for sale and advertise for sale at retail a quantity of Old Quaker at a price appreciably below the uniform Schenley retail price for the brand stipulated in the contracts. On October 16 the plaintiff informed the defendant of its trade policy in maintaining a uniform price for Old Quaker and other Schenley brands throughout the city. In particular, the defendant was advised of the provisions of the fair trade agreements executed conformably to the Fair Trade act. He was also informed of the irreparable injury which would result to the plaintiff if he persisted in executing his threat to "cut" the price of Old Quaker. The plaintiff specifically requested the defendant to refrain from his contemplated course and indicated its willingness to sell to him any Schenley products he might wish, provided he would agree not to sell them at retail below the standard list price. Subsequently, on several occasions the defendant offered for sale, and sold, large quantities of Old Quaker at seventy-seven cents per pint, or more than twenty per cent below the Schenley uniform retail price. The defendant was again urged to desist but refused. On November 8, 1935, he advertised Old Quaker for sale at seventy-seven cents per pint. None of the quantity advertised or sold by the defendant at the cut price was offered for sale, or sold, in the course of closing out any of such quantity for the purpose of discontinuing deliveries, nor because any of the liquor was damaged or deteriorated, nor owing to a court order. In short, the defendant does not come within the exceptions enumerated in section 1 of the Fair Trade act. During this time Old Quaker was in fair and open competition with about ten other brands of the same general class of commodity produced by persons other than the manufacturers of Schenley products.

[fol. 29] The plaintiff charged that as a consequence of the defendant's conduct a great number of retailers in the area where the defendant's store was located threatened to violate their contracts with it and the other local Schenley distributors by meeting the competitive price fixed by the defendant, and that several of the retailers did, in fact, breach their agreements. The result of meeting the cut-price established by the defendant was that the sales at the reduced prices did not yield the retailers a

fair and reasonable profit, and that when the public requested Old Quaker some of the merchants offered their customers substitute brands.

The concluding allegations of the complaint are, that if the defendant continues his practice the plaintiff will suffer irreparable injury to its business in the following respects: (1) Retailers who have signed fair trade agreements will be compelled to violate their agreements and sell below the Schenley standard price; (2) the cut-price will cause the public and consumers to believe that Old Quaker is not worth the uniform retail price, and, in consequence, the retailers will be unable to sell at the standard price; (3) great loss to the good will established by the local distributors will ensue and the value of the trademarks and trade-names of the Schenley products destroyed; (4) the public will become confused as to the various brands of such products; and (5) the market for them in Chicago will become demoralized and produce a general uneconomic lowering of prices.

The acts of the defendant previously set forth constituted, according to the plaintiff, an imminent threat to the destruction of its business. Money damages, it was claimed, would not compensate the plaintiff, and restraint of the defendant was alleged to be necessary to prevent multiplicity of legal proceedings.

The defendant, by a motion to dismiss the complaint, challenged the constitutionality of the Fair Trade act. The court held the statute valid and overruled the motion to dismiss. The defendant elected to abide by his pleading, and a decree was entered permanently enjoining him from vending at retail Old Quaker whisky at a price below $1.98 per quart, 98 cents per pint, and 50 cents per one-half pint, until the standard and uniform Schenley retail price for the brand named should be changed in Chicago. To obtain a reversal of that decree the defendant prosecutes this appeal.

The defendant contends that the decree is erroneous for the reason that the Fair Trade act violates the Federal and [fol. 30] State constitutions in the particulars set forth in his motion to dismiss the plaintiff's complaint. The propriety of the remedy employed is not assailed. The single question thus presented for decision is whether the statute squares with the Federal and State constitutions or offends

them in the respects assigned and argued by the defendant.

The contention is made that the Fair Trade act violates the equal protection of the laws provision of the fourteenth amendment to the Federal constitution, the due process clauses of the Federal and State constitutions, and also section 22 of article 4 of the State constitution. To sustain the decree the plaintiff maintains that the Fair Trade act constitutes a valid exercise of the police power, and that the statute is not open to the constitutional objections interposed.

The police power may be exercised not only in the interest of the public health, morals, comfort and safety but also for the promotion of the general welfare. (Fenske Bros. v. Upholsterers Union, 358 Ill. 239; City of Aurora v. Burns, 319 id. 84.) The case last cited contains a notable exposition of the doctrine that the police power of the State is not a static or dormant concept but is sufficiently dynamic to meet the varying needs of modern society. This court, in sustaining the validity of a zoning ordinance, observed: "With the growth and development of the State the police power necessarily develops, within reasonable bounds, to meet the changing conditions. (Public Utilities Com. v. City of Quincy, 290 Ill. 360.) The power is not circumscribed by precedents arising out of past conditions, but is elastic and capable of expansion in order to keep pace with human progress. Mr. Justice Holmes well defined the nature and extent of the power in Noble State Bank v. Haskell, 219 U. S. 104: 'It may be said in a general way that the police power extends to all the great public needs. (Camfield v. United States, 167 U. S. 518.) It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' "

Legislatures have long endeavored to promote free competition by laws aimed at trusts and monopolies such as the Anti-Trust act of this State, enacted in 1891. (Ill. State Bar Stat. 1935, p. 1235; Smith's Stat. 1935, p. 1201.) It is manifest that when the General Assembly enacted the Fair Trade act in 1935 it was attempting to modify its [fol. 31] former policy and to adopt an economic concept which has received widespread popular approval in recent years. The gist of the theory is that the manufacturer of a trade-marked article sold in competition with articles of

similar nature, who has designated a fair price at which he, as well as his distributor and retailer, can make a fair profit, has a property right in the good will towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to employ it in a misleading manner for the purpose of deceiving the public. "The basic theory on which this concept rests," observed the California Supreme Court in Max Factor & Co. v. Kunsman, 55 Pac. (2d.) 177, "is that, from a social standpoint, price cutting, in the long run, adversely affects the public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products." Section 2 of the California Fair Trade act, as does section 3 of our law, prohibits manufacturers from contracting between themselves to fix re-sale prices.

To the extent that the Fair Trade act effects a change in the economic public policy of this State we have no power to interfere. It is wholly immaterial whether the individual members of this court agree with the economic and social philosophy upon which the Fair Trade act is established, and no duty rests upon us to pass upon the wisdom of the economic public policy which it declares. That function is wholly legislative. It is not a judicial function to lecture either the public or business. Neither is it within the province of a court to philosophize concerning economic conditions. In passing, however, we cannot help but note that many of the present legislative enactments, such as the Fair Trade acts of New York, California and Illinois, are resultants brought about because of the failure of the public, and particularly the business public, to observe those ethical principles which lie at the very foundation of fair dealing and business honesty. The shady efforts made by some to obtain an unfair advantage over others are not compatible with good citizenship nor in keeping with the best traditions of the law merchant as known at the common law. If public opinion cannot check these practices then business can expect legislatures to attempt to remedy them.

The Fair Trade act is intended to curb one of these [fol. 32] practices by protecting the manufacturer who has built up a brand or article based on quality and excellence

and preventing its use as a "loss leader" by those who would sell it for the purpose only of inveigling the public into patronizing their places of business, in the hope of obtaining a profit on other goods of inferior quality. In other words, the reputation of the one is used for the personal advantage of the other. The legislative determination of whether this statute is a proper exercise of the police power, however, is not necessarily conclusive. Whether the means employed have any real, substantial relation to the public health, comfort, safety or welfare, or are essentially arbitrary and unreasonable, is a question which is subject to review by the courts. People v. Belcastro, 356 Ill. 144; People v. Rosehill Cemetery Co. 334 id. 555; Condon v. Village of Forest Park, 278 id. 218; People v. Steele, 231 id. 340.

The defendant maintains that section 2 of the Fair Trade act arbitrarily deprives him of his right to determine the price at which he will sell his commodities, and, in consequence, violates the due process clauses of the Federal and State constitutions. The right asserted is not unfettered, and is, of course, subject to the legitimate exercise of the police power. Although we find that only two courts of last resort have passed upon the validity of Fair Trade acts such as the one in controversy, an analogous statute was held constitutional nearly twenty years ago—Ingersoll & Bro. v. Hahne & Co. 88 N. J. Eq. 222, 101 Atl. 1030. A statute of the State of New Jersey enacted in 1916 declared it unlawful for any merchant, firm or corporation to appropriate for his or their own use a name, brand, trademark, reputation or good will of any maker in whose product they dealt, or to discriminate against it by depreciating the value of the product in the public mind by misrepresentation as to value or quality or by price inducement, except where the goods did not carry a notice prohibiting such practice. The factual situation disclosed that the complainant, a manufacturer of watches, sold under the Ingersoll name, among others, a watch known as the "Yankee Watch." This product was advertised throughout the United States to be sold to the consumer at $1.35. The complainant charged that the only method by which the watches could be sold for this low price was to manufacture them in immense quantities, and that the only way to obtain customers upon a large scale was by extensive advertising; that the name "Ingersoll" and the reputation of

[fol. 33] the firm for fair dealing and reliable products was nation wide; that it was absolutely necessary, as a part of the advertising and building up of the business, that a definite fixed price should form a part of the advertising for each of the products, and that all the Ingersoll watches were sold subject to a notice forbidding the retailer to dispose of them for less than a price fixed by the manufacturer. A jobber in New York disposed of the watches to a New Jersey retailer who sold them for less than the standard price. Upon the facts presented the statute was held valid. The vice-chancellor in his opinion said: "Complainant has no monopoly. Its goods are not manufactured under patents. It is constantly in competition with manufacturers of cheap watches. Not only is it morally bound as a result of its advertising to guarantee its product, but it, in fact, guarantees it in writing. The defendant makes use of the name, reputation, and guaranty of complainant for its own ulterior purpose and appropriates to itself the effect of the extensive advertising, upon which the complainant depends, for defendant's own profit, in violation of the contract expresed in the notice, and with no desire to benefit the public. A retailer does not sell a standard article at a loss for eleemosynary purposes." The injunction granted the complainant was subsequently made permanent in Ingersoll & Bro. v. Hahne & Co. 89 N. J. Eq. 332, 108 Atl. 128. The same jurist in this later case pointed out that, even in the absence of statute, contracts relating to trade and containing restraints are valid if such restraints are reasonable. In particular, the court said: "It is also well recognized that a person has a property interest in his trade-name and good will, and will, even in the absence of statute, be protected against injury to that trade-name and good will. This right has in this State been as above indicated recognized by statute. * * * In those cases in which the right to fix a re-sale price has been under consideration, the prohibition against the re-sale has been against the re-sale of the article itself. The name or trade-mark or what not has been so much an integral part of the article as that a re-sale of the article without reference to the trade-mark or trade-name would be practically impossible. In the case at bar the prohibition is not against a re-sale of the article, nor is it impracticable to re-sell the article without reference to the trade-name. * * * Complainant does not seek to

retain any right in the article itself; it merely seeks to re-[fol. 34] strain the use of its trade-name and good will, except under conditions fixed by it. It may permit the purchaser of the article to use its trade-name and good will under such conditions as it sees fit. * * * It seems to me that there is a clear distinction between those cases in which the nature of the restraint is such as necessarily to affect the re-sale of the article itself and the case at bar where the nature of the restraint is not such."

The contention was made in the celebrated case of Nebbia v. New York, 291 U. S. 502, that because the Milk-control law of New York essayed to control prices it denied due process. The Supreme Court of the United States, in answering this contention, said: "The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the State is incapable of directly controlling the price itself. This view was negatived many years ago.—Munn v. Illinois, 94 U. S. 113." The court reviewed numerous decisions (German Alliance Ins. Co. v. Lewis, 233 U. S. 389, Griffith v. Connecticut, 218 id. 563, O'Gorman & Young v. Hartford Fire Ins. Co. 282 id. 251, Frisbie v. United States, 157 id. 160, Yeiser v. Dysart, 267 id. 540, Cotting v. Kansas City Stockyards Co. 183 id. 79, and Stephenson v. Binford, 287 id. 251,) showing that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices. The court then observed: "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the fifth and fourteenth amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. (Wolff Packing Co. v. Industrial Court, 262 U. S. 522, 535.) The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest,'

and 'clothed with a public use,' have been brought forward as the criteria of the validity of price control, it has been [fol. 35] admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the State may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

The defendant, however, invokes Doubleday, Doran & Co. v. Macy & Co. 269 N. Y. 272, 199 N. E. 409, in which section 2 of the New York Fair Trade act, identical with the same section of our statute assailed in the present case, was held unconstitutional as applied to the facts set forth in the complaint. The articles in question were books. The Doubleday books are not "commodities" within the accepted meaning of the term. Each book rests upon its own merit, and outside of the binding and paper content it bears no similarity to the intent of the term used in the act, namely, commodities. A general statute such as the Fair Trade act may, of course, be invalid when applied to one set of facts and clearly valid when applied to other fact situations. (Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282.) The court in Max Factor & Co. v. Kunsman, supra, distinguished the Doubleday, Doran & Co. decision and held it inapplicable to the facts presented in the California case. The court said: "The plaintiffs in the New York case were Doubleday, Doran & Co. Inc., publishers, and Doubleday Doran Book Shops, Inc., retailers. The contract mentioned in the decision is one between the publishing corporation and the retailing corporation. Aside from any inference to be drawn from the similarity of names, the opinion states that the two plaintiffs, in reality, were one and the same, for it refers to 'the price which they (the plaintiffs) stipulated as a retail price in a *contract between themselves.*' Other language indicates the book shop corporation is merely a subsidiary and agent of the publishing company. Again, the plaintiff publishers sold the books in question to the defendant without exacting or,

in so far as appears, attempting to exact from the buyer any restriction on the price for re-sale. In other words, the producer of goods placed a retail price upon its product by its own independent action, and voluntarily sold the goods to a retailer (Macy & Co.) for re-sale without seeking, [fol. 36] or at least obtaining, any agreement by the retailer to observe any retail price. In the action, it seeks to prevent the retailer, to whom it has sold the goods without restrictions, from selling the goods at prices less than those which the producer saw fit to fix, in a contract between it and a subsidiary. The New York court accepts, for the purpose of the decision, the interpretation of the act as covering such situation, and upon that assumption, and apparently that assumption alone, holds section 2 of the act to be unconstitutional. The plaintiffs in the New York case allege only a single contract purporting to fix the re-sale prices, and that in a pretended contract made with itself, far different from the factual set-up in the Max Factor & Co. case. Here there has been adopted a system of making written contracts, generally between producers and retail distributors, under which the products may and will be sold only to retailers who will re-sell at specified prices and have entered into contracts with the distributor to so sell such products. Practically all of the wholesale and retail druggists in California have executed such contracts, and are observing them, and the plaintiffs' distributors have refused, and will refuse, to sell such products to wholesalers or retailers who do not enter into such contracts. A contract has been tendered to defendant for execution, but defendant will not enter into the agreement. The plaintiffs therefore declined to sell the commodities to defendant unless the defendant enters into the contract. The defendant, with full knowledge of the system of contracts, and the extent of the execution and compliance with their terms by the trade, has obtained Factor products 'unbeknown' to plaintiffs, and is selling them at prices less than the prices fixed by the contracts so extensively entered into by others. These facts serve to vitally differentiate the situation in New York from that here."

The defendant argues, however, that the Fair Trade act creates an arbitrary classification of persons and grants to such persons special privileges and immunities, in contravention of the constitutional guaranties invoked. He as-

serts that the vendors and vendees of commodities bearing the trade-mark, brand or name of the producer or owner may, under certain circumstances, fix the re-sale price thereof immune from the criminal penalties prescribed by the Anti-Trust act. The argument rests upon the assumption that there is no rational basis for denying to the vendors and vendees of commodities not bearing such [fol. 37] trade-mark symbols the right to fix the re-sale price without incurring the penalties of the Anti-Trust act.

The first section of the fourteenth amendment to the Federal constitution declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The fourteenth amendment does not purport to prevent a State, however, from adjusting its legislation to differences in situation, and to that end to make a justifiable classification. It merely requires that the classification shall be based on a real and substantial difference having a rational relation to the subject of the particular legislation. Nebbia v. New York, supra; Power Manufacturing Co. v. Saunders, 274 U. S. 490; Lindsley v. Natural Carbonic Gas Co. 220 id. 61; Magoun v. Illinois Trust and Savings Bank, 170 id. 283; Michigan Millers Ins. Co. v. McDonough, 358 Ill. 575; Stewart v. Brady, 300 id. 425.

Supplementing the equal protection provision of the fourteenth amendment, section 22 of article 4 of the constitution of this State prohibits the passage of a special law granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. The purpose of this provision is to prevent the enlargement of the rights of one or more persons and the impairment of or discrimination against the rights of others. To avoid falling within the constitutional inhibition of special legislation, the classfication of subjects or objects must be based upon some reasonable and substantial difference in kind, situation or circumstance bearing a proper relation to the purposes to be attained by the statute. Michigan Millers Ins. Co. v. McDonough, supra; Jones v. Chicago, Rock Island and Pacific Railway Co. 231 Ill. 302.

The California Supreme Court, in passing upon the validity of the Fair Trade act of California, section 1½

of which corresponds to the Fair Trade act of our State, (Max Factor & Co. v. Kunsman, supra) said: "Respondent also urges that the statute denies equal protection of the laws in that it applies only to articles sold under a trade-mark or trade or brand-name, and does not apply to non-trade-marked commodities, and, among trade-marked articles, applies only to those in free and open competition with others of a similar nature. As already pointed out, [fol. 38] it is only in reference to those commodities included within the statute that the manufacturer or producer has a property right in the nature of good will, which, in the public interest, should be protected. Such a classification is reasonable. The exclusion of trade-marked articles not in free and open competition with others of a similar nature is likewise reasonable. By that provision the public is protected from artificially high prices imposed by one with an exclusive market."

The Anti-Trust act expresses the public policy of the State against trusts and combinations organized for the purpose of suppressing competition and creating monopoly. (Harding v. American Glucose Co. 182 Ill. 551.) The Fair Trade act does not assume to permit restrictions on the price at which trade-marked commodities may be re-sold, irrespective of whether re-sold under the trade-mark. It permits restrictions to be placed on the use of trade-marks, names and brands—not restrictions on the price of commodities generally, except, as the plaintiff contends, to the extent that new commodities may become involved in an attempt to damage the good will built around a trade-mark, name or brand. The manifest legislative intent is the protection of the property interest in a mark, name or brand by preventing the use of the symbol by price-cutting retailers in ways likely to depreciate the property interest. Such competitors could also destroy a commodity built on merit by underselling, and thus destroying the purpose of the label intended to signify quality. As applied to the present case, by using the trade-name of a well known liquor the defendant, in effect, attracts the public to his store, and thereby induces the visitors to become the purchasers of other goods offered for sale. The defendant thus benefits at the expense of the trade-name "Old Quaker" by using the plaintiff's products as a means to draw trade. Price-cutting primarily injures the owner of a good will which has become identified with a trade-mark, brand or

name, on a commodity competing in the market with other goods of the same general class. On the other hand, the manufacturers and distributors of commodities which bear no trade symbol obviously cannot have a good will which requires the protection afforded by the Fair Trade act.

The only re-sale price maintenance, if any, permitted by the Fair Trade act is vertical. Vertical price maintenance merely enables a producer, or his distributor, to set a price at which the trade-marked commodity shall be sold [fol. 39] to the consumer. Section 1 specifically provides that a commodity, in order to be subject to the contracts permitted under the Fair Trade act, must be "in fair and open competition with commodities of the same general class produced by others." Section 3 declares that the act shall not apply to any contract or agreement between producers, or between wholesalers, or between retailers, as to sale or re-sale prices. In short, it does not apply to horizontal price maintenance. The statute clearly does not even tend to legalize trusts or monopolies. It does tend to prohibit trusts and monopolies. (Ingersoll & Bro. v. Hahne & Co. supra; Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 137 Pac. 144.) Application of section 2 of the statute to the facts discloses that Old Quaker whisky is in competition with other whiskies of like grade being sold in the Chicago market. No restraint rests upon the defendant inhibiting him from dealing in the competing goods of other products of the same general class sold by the plaintiff. He can freely sell whisky at a lower price than the standard price for Old Quaker. The statute merely prevents him from filching the good will associated with the descriptive mark and name "Old Quaker" for his own ulterior purposes.

Horwich v. Walker-Gordon Laboratory Co. 205 Ill. 497, is cited, however, to support the defendant's position that the Fair Trade act violates the constitutional limitations against arbitrary classification. This court, in the case relied upon, held that the Trade-mark act of 1901 violated section 22 of article 4 of our constitution. Section 2 of the statute declared it illegal for any person, without the written consent of the owner, to sell certain receptacles bearing the trade-mark, brand or name of the owner. Section 3 made the possession by any junk dealer of receptacles bearing registered trade-marks, prima facie evi-

dence that such possession was unlawful. The fourth section prescribed criminal penalties for the violation of the provisions of the act. An action was brought under section 6, which provided that any person might be enjoined from violating the second section. The court pointed out that the purpose of the statute was to facilitate the recovery of the receptacles described in the first section which had passed from the possession of their owners to others and which the owners desired to recover summarily. On the other hand, the Fair Trade act of 1935 has for its major objective the preservation and protection of the property interest of the producer and his distributors in the good [fol. 40] will represented by brands, trade-marks and trade-names. The law is also designed to protect the consumer's interests. The legislature by this act has attempted to benefit alike the producer, the distributor and the public. It is apparent that the objective of the Fair Trade act is not some purely personal goal, such as the summary recovery of certain types of personal property. The Horwich case, it is true, dealt with trade-marks, but solely in their character as indicia of ownership. In the present case the statute attacked deals not only with trade-marks in that respect, but also with the good will built up by a producer or distributor around a trade-mark, trade-name or brand, and provides that certain conduct with respect to the use of such trade-marks, names or brands constitutes unfair competition.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, is also invoked to sustain the defendant's position. The Illinois Trust act of June 20, 1893, prohibited trusts or combinations in restraint of trade or competition. Section 9 excepted from the provisions of the act agricultural products or livestock while in the hands of the producer or raiser. Section 10 provided that the purchaser of any article or commodity from such a trust or combination should not be liable for the price and might plead the act as a defense to any action therefor. Suit was brought to recover for the sale of sewer pipe and the statute was pleaded as a defense. The United States Supreme Court held that the discrimination created by the ninth section rendered the act repugnant to the provisions of the fourteenth amendment, respecting the equal protection of the laws.

The defendant argues that no distinction can be drawn between the classification condemned in the Connolly case, supra, and that provided by the Fair Trade act. The argument rests upon the premise that the Fair Trade act, in like manner as the Trust act of 1893, creates an unfair and arbitrary classification, in flagrant violation of the constitutional guaranty of equal protection of the laws. It is urged that the new law attempts to legalize business practices which have long been deemed illegal under the Anti-Trust act. The arguments are based upon erroneous premises and therefore must fall. The Anti-Trust act was never intended to interfere with the protection given to the good will established around the use of a trade-mark, brand or name. Obviously, it does not even purport to render illegal the conduct sanctioned by the Fair Trade act. Moreover, a retailer such as the defendant is not expressly pro- [fol. 41] hibited from removing the trade symbol and selling the whisky which he owns, at whatever price he pleases. Manifestly, there can be no interference with the enforcement of the Anti-Trust law under such circumstances.

An insuperable objection to the validity of the Fair Trade act, the defendant insists, is that the provisions of the statute are so incomplete, vague, indefinite and uncertain that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application. Statutes vulnerable to the objection stated have been declared unconstitutional as denying due process. (Champlin Refining Co. v. Commission, 286 U. S. 210; Parks v. Libby-Owens-Ford Glass Co. 360 Ill. 130.) On the other hand, where the words assailed, taken in connection with the context, are commonly understood, their use does not render a statute invalid. (People v. Huls, 355 Ill. 412.) Furthermore, the legislature is not required to define words in common and daily use. (People v. Lloyd, 304 Ill. 23.) A statute is sufficiently certain if the words and phrases employed have a technical or other special meaning well enough known to enable those within their reach to correctly apply them. (Hygrade Provision Co. v. Sherman, 266 U. S. 497; Omaechevarria v. Idaho, 246 id. 343; People v. Mueller, 352 Ill. 124; Amberson v. Amberson, 349 id. 249; Kowalczyk v. Swift & Co. 329 id. 308.) In the light of these authorities the following words and expressions

segregated and scrutinized by the defendant are not so ambiguous as to render the Fair Trade act void for uncertainty: "Articles of standard quality," employed only in the title; the phrase "in fair and open competition," in section 1; the words "any commodity," and the expression "any contract entered into pursuant to the provisions of section 1," in section 2.

The remaining contention which requires consideration is that section 2 of the Fair Trade act contravenes section 1 of article 4 of the constitution of this State, which provides that the legislative power shall be vested in the General Assembly. It is argued that section 2 delegates to such individuals as choose to avail themselves of the benefits of the statute the power to regulate the prices of commodities sold by others. The contention, and the argument supporting it, rest upon the unwarranted assumption that the Fair Trade act is primarily, and not incidentally, a price-fixing statute. In referring to the purpose of the California Fair Trade act the Supreme Court of that State said [fols. 42 & 43] that the act did not merely prohibit price-cutting for the purpose of regulating prices, but also prohibited the practice in a legitimate legislative attempt to afford protection to the validly-acquired rights of others. (Max Factor & Co. v. Kunsman, supra.) The Fair Trade act of this State does not even attempt to fix or delegate to others the right to fix the price at which any commodity may be sold in the market. It is true, however, that re-sale price maintenance laws, such as the Fair Trade acts of California, New York and Illinois, constitute permissive or conditional legislation. Specifically, our statute does not contain any mandatory requirements, nor does it fix the prices which are to be imposed. No question of governmental price-fixing is, in consequence, involved. In other words, the law would remain wholly inefficacious unless the conditions which it prescribes are met. The plaintiff, for example, is not commanded to operate under it. Only in the event that manufacturers or distributors elect to avail themselves of its provisions does the statute come into actual operation. This does not mean that the act took effect upon the approval of any authority other than the legislative branch of our State government. (Commonwealth v. Goldburg, 167 Ky. 96, 180 S. W. 68.) When the Fair Trade act was passed by the General Assembly it

was a complete statute, in no manner dependent for approval or disapproval by any person or group of persons. The defendant's contention that the statute unlawfully delegates legislative power is without merit.

Two objections interposed in the trial court, namely, that the Fair Trade act violates the constitutional provisions against legislation impairing the obligation of contracts, and that it constitutes an invalid attempt to regulate the sale of commodities in interstate commerce, have not been argued on this appeal. They do not, therefore, require consideration.

The decree of the trial court is right, and it will be affirmed.

Decree affirmed.

[fol. 44] In Supreme Court of Illinois, April Term, 1936

Agenda 37

No. 23531

Seagram-Distillers Corporation, Appellee,

v.

Old Dearborn Distributing Company, Appellant

Appeal from Circuit Court Cook County

Opinion—Filed June 17, 1936

Mr. Justice Jones delivered the opinion of the Court:

At the suit of Seagram-Distillers Corporation the Circuit Court of Cook County permanently enjoined Old Dearborn Distributing Company from wilfully and knowingly advertising, offering for sale, or selling "Seagram's" or "Kessler's" products in this state at less than the prices stipulated by plaintiff from time to time, under the "Fair Trade Act", in accordance with the terms of contracts made pursuant to that Act between plaintiff and distributors or retailers. There is no material dispute as to the facts. Plaintiff, a Delaware corporation, licensed to do business in Illinois deals in alcoholic beverages solely at wholesale. It does not manufacture but buys Seagram's whiskeys and

gins and Kessler's blended whiskeys from the producers, Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc., and affiliated corporations. Its place of business in this state is in the city of Chicago. It has been so engaged in business since July, 1934. The commodities it sells bear labels and trademarks and they are in fair and open [fol. 45] competition with commodities of the same general class produced by others. Defendant is a corporation operating four retail liquor stores in the City of Chicago. Its charter powers include sales at both wholesale and retail. Plaintiff's sales in Chicago have been confined to wholesale distributors. It has never sold any of the products in controversy to defendant but has sold other liquors to it. Contracts in conformity with the terms of the Fair Trade Act have been executed between plaintiff and certain distributors, and between plaintiff and certain numerous Illinois retailers, although plaintiff does not sell beverages direct to any retailer. One of such contracts was executed by plaintiff and signed by defendant's secretary and treasurer. The contracts provide that the Seagram products shall not be sold, advertised or offered for sale in Illinois below the prices stipulated by plaintiff. Defendant sold such merchandise at cut prices, but at a profit to itself. It continued to do so after plaintiff's demand that it cease such practice. On account of such price-cutting plaintiff and other retailers dealing in Seagram products suffered a diminution of sales during the price-cutting period. Some dealers took the products from display, and some of them notified plaintiff they could not compete with defendant and would discontinue handling Seagram products unless the price-cutting was stopped. Defendant was a party to breaches of other Fair Trade contracts between plaintiff and certain distributors, and continued the price-cutting throughout the trial of the instant case.

Defendant contends that the Fair Trade Act (Pars. 8-11, chap. 140, Ill. State Bar Stat. 1935) violates several specified provisions of the State and Federal Constitutions, the Sherman Anti-Trust Act, the Anti-Trust Act of this State, and the Federal Trade Commission Act; that resale price-[fol. 46] maintenance contracts are invalid under such constitutional and statutory provisions and are void at common law as unfair competition. These contentions are an-

swered adversely to defendant's claim in The Joseph Triner Corporation v. Carl W. McNeil, No. 23475 decided at the present term of this court. That opinion sets out the pertinent provisions of the Act and they need not be repeated here.

The claim that the transactions between plaintiff and defendant are interstate transactions must likewise be denied. Plaintiff maintains a warehouse in Chicago and all of its purchases are delivered there from the producers. The products are not shipped to plaintiff's customers from outside the state but are delivered from its Chicago warehouse. They are in no sense interstate transactions. (Rudin v. King-Richardson Co. 311 Ill. 513; Schechter Poultry Corporation v. U. S. 295 U. S. 495.)

Neither does the Act violate Section 13 of Article IV of the Constitution of this state by amending the Illinois Anti-Trust Act without including that subject in the title. The Fair Trade Act is complete within itself and does not purport either in its title or in the body thereof to amend or revive any other Act. Even though it may by implication modify or repeal prior existing statutes, that fact does not constitute a violation of the constitutional provisions. The Constitution does not require that all legal effects of an Act, such as a repeal by implication of a former act, shall be stated in the title. Where the subject of the Act itself is embraced in the title, all legal consequences necessarily flowing from it will, for the purpose of constitutional requirement, be regarded as embraced in the title. (Village of Averyville v. City of Peoria, 335 Ill. 106; People v. Borgeson, id. 136.)

[fol. 47] It is argued that the facts show a conspiracy to stifle competition and fix prices in restraint of trade and that therefore plaintiff comes to court with unclean hands, and cannot maintain its action. There is no showing nor even an attempt to show that plaintiff has entered into an agreement or understanding with any other person or corporation in a like situation to maintain or control the sale price or resale price of any commodity handled by it. Nor does the fact that defendant is a wholesaler take the transactions without the terms of the statute. It does not deal directly with plaintiff. If it desired to purchase at wholesale from plaintiff it would be in the same class

as other distributors to whom plaintiff sells. The relation between plaintiff and the wholesalers to whom it sells is different from the relation among such purchasing wholesalers. It is the same relation that the wholesaler bears to the retailers to whom he sells. Contracts between plaintiff and wholesale distributors or between distributors and retailers, are denominated vertical price-fixing contracts. Such contracts are permitted by the statute. Contracts between producers or between wholesalers or between retailers as to sale or resale prices are denominated horizontal price-fixing contracts and are not within the terms of the statute because of their character as combinations in restraint of trade. Such contracts are uniformly held invalid. The admitted facts show that the transactions in controversy belong in the class of vertical price-fixing contracts, which are not subject to the contention urged.

We are not concerned with the claim that the contract between plaintiff and defendant was not executed by the defendant's proper officers, or that it is invalid for lack of mutuality. Section 2 of the Fair Trade Act applies to wil- [fol. 48] fully and knowingly advertising, offering for sale or selling any commodity at less than the prices stipulated in any contract entered into pursuant to the provisions of Section 1 of the Act, whether the person so doing is or is not a party to such contract.

We are of the opinion that the Fair Trade Act is valid and that under the facts in this record plaintiff was entitled to equitable relief by injunction. The decree of the circuit court was correct and is accordingly affirmed.

Decree affirmed.

[fol. 49] IN SUPREME COURT OF ILLINOIS

No. 23531

SEAGRAM-DISTILLERS CORPORATION, Appellee,

vs.

OLD DEARBORN DISTRIBUTING COMPANY, Appellant

Appeal from Circuit Count, Cook ——

JUDGMENT—June 17, 1936

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Decree aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error;

Therefore, it is considered by the Court that the Decree of the Circuit Court aforesaid, be Affirmed in all things and stand in full force and effect, notwithstanding the said [fols. 50-60] matter and things therein assigned for error.

And it is further considered by the Court that the said Appellee recover of and from the said Appellant its costs by it in this behalf expended and that he have execution therefor.

[fol. 61] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER ALLOWING APPEAL, ETC.—Filed July 7, 1936

The petition of Old Dearborn Distributing Company, a corporation, for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of the State of Illinois and the assignment of errors filed therewith and the record of said cause having been considered, it is:

Ordered that an appeal be and is allowed to the Supreme Court of the United States from the Supreme Court of the

State of Illinois as prayed in said petition, and that the Clerk of the Supreme Court of the State of Illinois so prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within thirty (30) days from the date hereof.

It is Further Ordered that said Old Dearborn Distributing Company, a corporation, shall give good and sufficient security in the sum of two hundred fifty ($250.00) dollars, that said Appellant shall prosecute said appeal to effect, [fol. 62] and if said Appellant fail to make its plea good, it shall answer all damages and costs.

The said Appellant now presenting a bond in the sum of two hundred fifty ($250.00) dollars with Maryland Casualty Company of Baltimore, Maryland, as surety, it is:

Ordered that the same be, and is hereby approved.

Lott R. Herrick, Chief Justice of the Supreme Court of Illinois in the Last Resort in All Cases in Illinois.

Dated July 3, 1936.

[fols. 62½-75] [File endorsement omitted.]

[fol. 76] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed July 24, 1936

Comes now, Old Dearborn Distributing Company, a corporation, the Appellant in the above entitled cause, and states that the points upon which it intends to rely in this Court in this case are as follows:

1. The Illinois Fair Trade Act, Chapter 140, Sections 8 to 11 inclusive, page 3091, Illinois Revised Statutes 1935 deprives the appellant of its liberty without due process of law in violation of section 1 of the 14th Amendment to the Constitution of the United States of America.

2. The Illinois Fair Trade Act, Chapter 140, Sections 8 to 11 inclusive, page 3091, Illinois Revised Statutes 1935 deprives the appellant of its property without due process

of law in violation of section 1 of the 14th Amendment to the Constitution of the United States of America.

3. The Illinois Fair Trade Act, Chapter 140, Section 8 to 11 inclusive, page 3091, Illinois Revised Statutes 1935 deprives the appellant of the equal protection of the laws in violation of section 1 of the 14th Amendment to the Constitution of the United States of America.

4. The Illinois Fair Trade Act, Chapter 140, Sections 8 to 11 inclusive, page 3091, Illinois Revised Statutes 1935 is in violation of the first section of the 14th Amendment to the Constitution of the United States and therefore avoid for the following reasons:

(a) The said statute provides for price fixing by private individuals and the enforcement of said prices so fixed against parties not in contractual relationship with the person so fixing said prices as in said statute provided, and [redacted] not a proper exercise of the police power of the state or regulatory measure thereunder.

[fol. 77] (b) The right to buy, sell, barter, and exchange property and to fix the price at which one's own property shall be sold is an inherent right of the property itself and is subject to protection of section 1 of the 14th Amendment to the constitution of the United States.

(c) The "liberty" protected by section 1 of the 14th Amendment to the constitution of the United States embraces more than physical restraint and the freedom therefrom; and includes freedom to contract and pursue a lawful calling.

(d) The fundamental rights guaranteed by section 1 of the 14th amendment to the constitution of the United States are abridged and curtailed by said statute without justification, the said statute being a general restraint affecting all business of a private nature.

(e) The said statute imposes restrictions upon liberty and property in the absence of any purpose of protecting the public health, morals, safety or welfare; the said statute operates in an arbitrary, unreasonable and discriminatory manner and the said statute does not provide means which are appropriate to achieve the statutory purpose.

(f) The said statute fixing prices on ordinary commodities sold by ordinary businesses, is not within the scope of any constitutional power of the legislature of the state of Illinois.

(g) The said statute unconstitutionally vests in private persons arbitrary power to fix the prices at which another may sell his own property.

(h) The said statute grants to private persons unlimited power over the liberty and property of other persons and is too unrestrained and too susceptible of abuse.

(i) The said statute permits arbitrary, unreasonable and discriminatory price fixing.

(j) The said statute, if it is assumed, contrary to fact, that the prevention of use of "loss leaders" is the purpose of the statute, provides means adopted for the prevention of such practices wholly irrelevant to that purpose.

(k) The said statute, if it is assumed, contrary to fact, that the prevention of predatory price cutting (meaning thereby price cutting with deliberate intention to injure other persons) is the real object of the statute, then the statute in applying indiscriminately to all sales of all commodities at a price less than fixed by a manufacturer transcends the constitutional limits of legislative power.

(l) Said statute insofar as it purports to fix, determine, limit, restrict or regulate the prices at which the appellant may dispose of its property and without contractual relationship with the person so fixing said prices, deprives the appellant of its liberty and property by unreasonably and unduly interfering with the conduct of a lawful business, to-wit: the merchandising of alcoholic beverages.

(m) Said statute in the respect mentioned in the foregoing subdivision denies to the appellant the equal protection of the laws of the State of Illinois since it unduly and unreasonably interferes with the right of the appellant to acquire, possess and protect property as provided in Article 2, Sections 1 and 2 of the Constitution of the State of Illinois.

[fol. 78] Appellant further states that only the following parts of the record, as filed in this court, are deemed neces-

sary to be printed for the consideration of the points set forth above, viz.:

Title of Paper	Record Page
Complaint	2- 6
Answer	7-13
Reply	14-15
Decree	16-18
Opinion (Joseph Triner Corporation vs. McNeil Supreme Court of Ill. No. 23475)	24-42
Opinion in instant cause	43-48
Mandate	49-50

Dated July 10, 1936.

Irving Breakstone, Irving Greenspahn, Counsel for Appellant.

STATE OF ILLINOIS,
Cook County, ss:

William Rosenthal being first duly sworn on oath says that he is an attorney at law, and that on July 10, 1936 he did on Mayer Meyer Austrian & Platt, attorneys of record for the appellee, make due and timely service of the above statement of points to be relied upon and designations of the parts of the record material and necessary to the consideration of the case, this 10th day of July A. D. 1936, by leaving a true copy thereof with Mr. Richard Mayer, a member of said firm.

William Rosenthal.

Subscribed and sworn to before me this 10th day of July 1936. David Cohl, Notary Public Cook County Illinois. My Commission Expires August 18th 1938. (Seal.)

[fol. 78½] [File endorsement omitted.]

[fols. 79 & 80] SUPREME COURT OF THE UNITED STATES

APPELLEE'S DESIGNATION FOR PRINTING OF ADDITIONAL PARTS OF RECORD—Filed July 20, 1936

Comes now Seagram-Distillers Corporation, a corporation, Appellee in the above entitled cause, having been served with Appellant's Statement of Points to be Relied

upon and Designation of the Parts of the Record to be Printed, and does hereby designate, pursuant to paragraph 9 of Rule 13 of this Honorable Court, that the following additional parts of the record are necessary for and material to the consideration of the points involved in this cause and should therefore be printed:

The Abstract of Record filed with the Clerk of the Court, except the Decree and such portion of the pleadings contained in said Abstract which have already been designated to be printed by Appellant.

Dated July 19, 1936.

Richard Mayer, Counsel for Appellee.

[fol. 81] [File endorsement omitted.]

Endorsed on cover: File No. 40,766. Illinois Supreme Court. Term No. 226. Old Dearborn Distributing Company, appellant, vs. Seagram-Distillers Corporation. Filed July 24, 1936. Term No. 226, O. T., 1936.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 226

OLD DEARBORN DISTRIBUTING COMPANY, A CORPORATION,

Appellant,

vs.

SEAGRAM-DISTILLERS CORPORATION, A CORPORATION,

Appellee.

MOTION FOR LEAVE TO FILE SEPARATE STATEMENT AS TO JURISDICTION.

Comes now Old Dearborn Distributing Company, a corporation, defendant-appellant in the above entitled cause and moves the Court for leave to file instanter its separate statement as to jurisdiction, hereto attached, of this Court to review the instant cause upon appeal pursuant to the provisions of Paragraph I, Rule 12 of this Court, in lieu of that heretofore filed.

OLD DEARBORN DISTRIBUTING COMPANY,
A CORPORATION,
(*Defendant*) *Appellant,*
By NICHOLAS J. PRITZKER,
IRVING BREAKSTONE,
IRVING GREENSPAHN,
Its Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 226

OLD DEARBORN DISTRIBUTING COMPANY, A CORPORATION,

Appellant,

vs.

SEAGRAM-DISTILLERS CORPORATION, A CORPORATION,

Appellee.

SEPARATE STATEMENT AS TO JURISDICTION.

Pursuant to Supreme Court Rule 12, par. 1, Old Dearborn Distributing Company, a corporation, the above appellant, files this its statement showing the basis on which said appellant contends that the Supreme Court has appellate jurisdiction to review on appeal the judgment appealed from herein as follows:

(A) Statutory Provision Sustaining Jurisdiction: 28 U. S. C. A.

Sec. 344 (a) providing for review in this Court by appeal (substituted for writ of error by 28 U. S. C. A., Sec. 861 (a), as amended, and Sec. 861 (b) of a final judgment in the highest court of a State in which a decision in the suit could

be had, where is drawn in question the validity of a statute of any State on the ground of it being repugnant to the Constitution of the United States, and the decision is in favor of its validity. The same statute is described as 45 Stat. L. 54, Sec. 237 (a) Judicial Code.

(B) Nature of Case and Ruling Below.

The appeal herein is from a judgment of the Supreme Court of Illinois in a civil case in equity, to enjoin the defendant and appellant, from selling certain alcoholic beverages below resale prices fixed by the plaintiff and appellee, in no contractual relationship with defendant and appellant, the latter having purchased said liquors from others than the plaintiff and appellee, which judgment was made under and pursuant to the purported authority of Chapter 140, Sections 8 to 11, inclusive, of Illinois Revised Statutes 1935, at page 3091, commonly known as the "Fair Trade Act" and which is in form as follows:

> "An Act to protect trade-mark owners, distributors, and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade-mark, brand or name.
>
> "*Unfair Competition.*—Trade-Mark—Provisions against resale—Validity of contract, Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:
>
> (1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be re-sold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity; provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

What Constitutes Unfair Competition—Action.

SEC. 2. Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

SEC. 10. Application of Statute.—(3) This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

SEC. 11. Short Title.—(4) This Act may be known and cited as the "Fair Trade Act."

This statute was approved July 8, 1935, and its validity is drawn in question upon the ground that said statute is repugnant to Section 1 of the 14th Amendment to the Constitution of the United States. The final decision of the Supreme Court of the State of Illinois in the last resort in all causes in the state of Illinois in which a decision could be had, is in favor of the validity of said statute (R. 44). The defendant and appellant raised the Constitutional questions in the Supreme Court of Illinois, and filed a brief and made oral argument in said court contending that said statute was in violation of the first section of the 14th amendment to the constitution of the United States. The defendant and appellant raised the Constitutional questions in the Circuit Court of Cook County, Illinois, the court of first instance, by alleging in its answer that the said statute was repugnant to Sec. I of the 14th Amendment to the Constitution of the United States, and assigned as error in the Supreme Court of Illinois the ruling of the Circuit Court of Cook County, Illinois, sustaining the validity of said statute and holding that the same did not violate the provision of Section I of the 14th Amendment to the Constitution of the United States.

Paragraph 11 of defendant's and appellant's answer is as follows:

> "Defendant states that Sections VIII to XI, inclusive, of Chapter 140, Illinois Revised Statutes, 1935, upon which plaintiff's purported cause of action is based, and upon which the validity of its purported contract is premised, is unconstitutional and void because:
>
> (a) They violate the provisions of Section 2 of Article II of the Constitution of Illinois.
>
> (b) They violate the provisions of the Fifth Amendment and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

and that the alleged contract referred to in the complaint as Exhibit One is invalid and unenforceable because:

(a) The said contracts violate the criminal law of Illinois in regard to pools, trusts and combinations.

(b) They violate the public policy of Illinois.

(c) They violate the common law of Illinois.

(d) They violate the provisions of Section 2 of Article II of the Constitution of Illinois.

(e) They violate the provisions of the Fifth Amendment and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

(f) That in the alternative if the said contract set forth in the complaint as Exhibit One is the contract of the defendant the same is void because it is executed without consideration, because it is unilateral and lacks mutuality and therefore void'' (R. 10).

The assignments of error on the appeal with the Supreme Court of Illinois from the decree of the Circuit Court of Cook County of Illinois, under the rules of practice of the Supreme Court of Illinois, are contained in the brief of the defendant and appellant in that court, and are mentioned in the opinion of the Court in the instant case, 363 Illinois 610, and by the ninth assignment of error therein contained raised the question that the Illinois Fair Trade Act, the statute in question, violated the Constitution of the United States.

Appeals in equity in Illinois are to the Supreme Court of Illinois in all cases involving the constitutionality of a statute.

The said Supreme Court of the State of Illinois in the last resort in all causes in the State of Illinois rendered its decision by Mr. Justice Norman L. Jones, one of the Justices of the Supreme Court of Illinois, affirmed the judgment of the Circuit Court of Cook County, Illinois. The

opinion of the said Supreme Court of the State of Illinois in the last resort in all causes in Illinois is officially reported in Volume 363, Illinois Supreme Court Reports, 559 and 610. The order for affirmance by the Supreme Court of the State of Illinois and the remittitur were entered in the office of the Clerk of said Court on July 2, 1936 (R. 49). The decision made mention of the Federal question raised by appellant and no attack based on the Constitution of the United States had ever previously been made against the act save in said opinions as set forth.

The decision could not have been made except it was made against appellant's contentions as to the Federal question involved.

(C) **Date of Judgment and Date of Application for Appeal.**

The judgment sought to be reviewed was entered June 17, 1936 (R. 49). Petition for rehearing was not filed and the judgment became final July 2, 1936. Application for appeal was presented on July 3, 1936, to the Honorable Lott R. Herrick, Chief Justice of the Supreme Court of Illinois, being the court of last resort for all actions in Illinois, and was by him allowed (R. 52, 61).

The constitutional questions involved are substantial. Irrespective of the ultimate aim of the statute, its immediate effect is to fix prices upon all retailers not by agreement, but by operation of law. This Court has heretofore held repeatedly that normally the use of property and the execution of contracts are of private concern, and that in general both are free from governmental interference. This Court stated in *Nebbia* v. *New York,* 291 U. S. 502, 524:

> "These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private

right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property.

"The question to be determined in this case, as in other cases where state regulation is challenged under these constitutional provisions, is whether the circumstances "vindicate * * * it as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." The fact that the regulation in question is concerned with price fixing does not remove it from the general rule (*Nebbia* v. *New York, supra*)."

There are a multitude of cases in this Court invalidating state statutes purporting to regulate the prices of such commodities (*Tyson* v. *Banton,* 273 U. S. 418 (price of theatre tickets); *Ribnick* v. *McBride,* 277 U. S. 350 (fees of employment agencies); *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522 (wages); *Fairmont Creamery* v. *Minnesota,* 274 U. S. 1 (price of cream); *Williams* v. *Standard Oil,* 278 U. S. 235 (price of gasoline); *People* v. *Gillson,* 109 N. Y. 389 (price of food); see also *New State Ice Co.* v. *Liebmann,* 285 U. S. 262 (statute requiring licenses of ice dealers)).

As stated in *Tyson* v. *Banton* (273 U. S. 418, 438) (declaring invalid a statute fixing prices of theatre tickets), after reviewing the authorities:

"Each of the decisions of this court upholding governmental price regulation aside from cases involving legislation to tide over temporary emergencies has turned upon the existence of conditions peculiar to the business under consideration which bore such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the case."

The constitutional questions involved require the application of all the principles heretofore enunciated in the decisions of this Court to a new and novel legislative attempt on the part of a State to regulate and control private business, with all the ramifications, economic and jural incident thereto, and of a nature so substantial as to absolutely require a final determination by decision of this Court.

Appendant hereto are copies of the opinions as follow:

Respectfully submitted,

OLD DEARBORN DISTRIBUTING COMPANY,
A CORPORATION,
(*Defendant*) *Appellant*,
By NICHOLAS J. PRITZKER,
IRVING BREAKSTONE,
IRVING GREENSPAHN,
Its Counsel.

EXHIBIT "A".

(No. 23475—Decree Affirmed.)

THE JOSEPH TRINER CORPORATION, *Appellee,*

vs.

CARL W. MCNEIL, *Appellant.*

(363 Ill. 559.)

OPINION—Filed June 10, 1936.

MR. JUSTICE WILSON delivered the opinion of the court:

This is a proceeding instituted by the plaintiff seeking relief under the provision of the Fair Trade act, approved July 8, 1935. (Ill. State Bar Stat. 1935, p. 3091; Smith's Stat. 1935, p. 2893.) The title of the statute expresses its purpose as "An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trademark, brand or name." Section I provides:

"SEC. I. No contract relating to the sale or re-sale of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract.

"(1) That the buyer will not re-sell such commodity except at the price stipulated by the vendor.

"(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, re-sell except at the price stipulated by such producer or vendee.

"Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be re-

sold without reference to such agreement in the following cases:

"(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity; provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

"(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

"(3) By any officer acting under the orders of any court."

There appears to be no serious contention that the act, up to this point, is invalid and unenforcible. We are particularly concerned with section 2, which declares that "willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section I of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." The third section provides that the act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or re-sale prices. The Fair Trade act thus permits vertical re-sale price maintenance, but condemns, as do the Federal and State Anti-trust laws, horizontal arrangements for fixing prices. The act prescribes no criminal penalties.

The facts upon which this action is predicated are not in dispute. Schenley Distributors, Inc., licensed to transact business in Illinois, is the sole sales agent and representative in this State for certain liquors and alcoholic beverages manufactured by several affiliated distilleries known as the Schenley distilleries. "Old Quaker" is the brand name of one of the Schenley products, and the name has been duly registered as a trade-mark with the United States patent office. Affixed to each bottle of Old Quaker

is a distinctive label, upon which appear the figure of a Quaker standing before a sheaf of grain, a sack of malt, and three barrels marked "Old Quaker Whisky." Above the picture is the legend, "Bottled at the Distillery. Old Quaker. Reg. U. S. Pat. Off. Brand." The name "Old Quaker" appears in bold lettering. Below the picture there is this statement: "One pint. Straight bourbon whisky. Distilled and bottled by the Old Quaker Company. Distillers. Lawrenceburg, Indiana. Division of Schenley Products Company." The whisky has been sold and retailed under the trade-mark which definitely designates the brand and has become well known to the trade. This brand is retailed at $1.89 per quart, 98 cents per pint and 50 cents per one-half pint. These prices, under existing conditions, appear to be fair prices when considered with like commodities.

The method of merchandising Old Quaker, as set forth in the complaint, is as follows: Schenley Distributors, Inc., the sales agent, sells to ten wholesale distributors in Chicago, one of whom is the plaintiff, suggesting to these local distributors a minimum retail price which it fixes as the uniform retail price for Old Quaker and each of the other brands of Schenley products to be sold in Chicago. This price is the uniform and standard Schenley retail price. If a distributor sells to a retailer who is known to sell below the Schenley list price, Schenley Distributors, Inc., refuses further to sell Schenley products to such distributor. The distributors, in turn, refuse to sell Old Quaker, or any other Schenley product, to any retailer in Chicago except on the condition that such retailer will not sell below the uniform Schenley retail price. To that end the plaintiff and the other local distributors make all sales of Old Quaker or other Schenley products under agreements of sale denominated "Fair Trade Agreements," which expressly provide that the retailer will not re-sell in the city except at the uniform and standard Schenley retail price. From the allegations of the complaint it further appears that as a direct result of the trade policy and practice described, approximately eighty-five per cent of the retailers of Schenley products in Chicago consistently maintain the

Schenley retail price list for Old Quaker and other Schenley brands.

The Joseph Triner Corporation, the plaintiff, is a domestic corporation engaged in business in Chicago as a wholesale distributor, selling to retailers for re-sale in that city various brands of liquor and alcoholic beverages of standard quality. On November 8, 1935, it brought an action in the circuit court of Cook county to restrain Carl W. McNeil, the defendant, a retail liquor dealer, from selling Old Quaker whisky in the Chicago district at prices less than those provided in the fair-trade agreements previously mentioned. From the allegations of the complaint, which the defendant by his motion to dismiss admitted to be true, it appears that the plaintiff was also operating pursuant to the trade policy and practice by which the Schenley Distributors, Inc., sought to maintain the prices specified in the fair-trade agreements.

The complaint charges that a few vendors of liquor at retail in Chicago pursue a practice of "cutting" the prevailing retail price of brands of liquor which have acquired widespread attention and public favor. These retailers, it is charged, sell the popular brands at prices conspicuously lower than the prevailing price and at a loss or scant return to themselves, for the purpose of attracting the public to their stores and selling other brands of liquor or general merchandise at prices sufficiently high to meet the loss and assure a general profit. The use of "leaders" in this familiar form of price-cutting is asserted to cause irreparable loss not only to the producer of brands sold at the cut-price and to the distributors of such brands but also to the ultimate consumers or general public.

The plaintiff, at the time of filing its complaint, had established a substantial and profitable business in selling at wholesale Old Quaker and other Schenley products in Chicago. A valuable asset of its business is the good will of the retailers who purchase from it for re-sale in the city the various brands of Schenley products, including Old Quaker. Similarly, the good will of the public and consumers who purchase such products is deemed an important asset. According to the complaint a uniform price

assures the retailers comparative immunity from injurious price-cutting by other retailers and a reasonable profit upon their retail sales.

In October, 1935, the defendant, with full knowledge of the fair trade agreements entered into by the plaintiff and the other local Schenley distributors with substantially all the retailers of liquor in Chicago, threatened to sell, offer for sale and advertise for sale at retail a quantity of Old Quaker at a price appreciably below the uniform Schenley retail price for the brand stipulated in the contracts. On October 16 the plaintiff informed the defendant of its trade policy in maintaining a uniform price for Old Quaker and other Schenley brands throughout the city. In particular, the defendant was advised of the provisions of the fair trade agreements executed conformably to the Fair Trade act. He was also informed of the irreparable injury which would result to the plaintiff if he persisted in executing his threat to "cut" the price of Old Quaker. The plaintiff specifically requested the defendant to refrain from his contemplated course and indicated its willingness to sell to him any Schenley products he might wish, provided he would agree not to sell them at retail below the standard list price. Subsequently, on several occasions the defendant offered for sale, and sold, large quantities of Old Quaker at seventy-five cents per pint, or more than twenty per cent below the Schenley uniform retail price. The defendant was again urged to desist but refused. On November 8, 1935, he advertised Old Quaker for sale at seventy-seven cents per pint. None of the quantity advertised or sold by the defendant at the cut-price was offered for sale, or sold, in the course of closing out any of such quantity for the purpose of discontinuing deliveries, nor because any of the liquor was damaged or deteriorated, nor owing to a court order. In short, the defendant does not come within the exceptions enumerated in section I of the Fair Trade act. During this time Old Quaker was in fair and open competition with about ten other brands of the same general class of commodity produced by persons other than the manufacturers of Schenley products.

The plaintiff charged that as a consequence of the defendant's conduct a great number of retailers in the area where the defendant's store was located threatened to violate their contracts with it and the other local Schenley distributors by meeting the competitive price fixed by the defendant, and that several of the retailers did, in fact, breach their agreements. The result of meeting the cut-price established by the defendant was that the sales at the reduced prices did not yield the retailers a fair and reasonable profit, and that when the public requested Old Quaker some of the merchants offered their customers substitute brands.

The concluding allegations of the complaint are, that if the defendant continues his practice the plaintiff will suffer irreparable injury to its business in the following respects: (1) Retailers who have signed fair trade agreements will be compelled to violate their agreements and sell below the Schenley standard price; (2) the cut-price will cause the public and consumers to believe that Old Quaker is not worth the uniform retail price, and, in consequence, the retailers will be unable to sell at the standard price; (3) great loss to the good will established by the local distributors will ensue and the value of the trade-marks and trade-names of the Schenley products destroyed; (4) the public will become confused as to the various brands of such products; and (5) the market for them in Chicago will become demoralized and produce a general uneconomic lowering of prices.

The acts of the defendant previously set forth constituted, according to the plaintiff, an imminent threat to the destruction of its business. Money damages, it was claimed, would not compensate the plaintiff, and restraint of the defendant was alleged to be necessary to prevent multiplicity of legal proceedings.

The defendant, by a motion to dismiss the complaint, challenged the constitutionality of the Fair Trade act. The court held the statute valid and overruled the motion to dismiss. The defendant elected to abide by his pleading, and a decree was entered permanently enjoining him from vending at retail Old Quaker whisky at a price below

$1.98 per quart, 98 cents per pint, and 50 cents per one-half pint, until the standard and uniform Schenley retail price for the brand named should be changed in Chicago. To obtain a reversal of that decree the defendant prosecutes this appeal.

The defendant contends that the decree is erroneous for the reason that the Fair Trade act violates the Federal and State constitutions in the particulars set forth in his motion to dismiss the plaintiff's complaint. The propriety of the remedy employed is not assailed. The single question thus presented for decision is whether the statute squares with the Federal and State constitutions or offends them in the respects assigned and argued by the defendant.

The contention is made that the Fair Trade acts violates the equal protection of the laws provision of the fourteenth amendment to the Federal constitution, the due process clauses of the Federal and State constitutions, and also section 22 of article 4 of the State constitution. To sustain the decree the plaintiff maintains that the Fair Trade act constitutes a valid exercise of the police power, and that the statute is not open to the constitutional objections interposed.

The police power may be exercised not only in the interest of the public health, morals, comfort and safety but also for the promotion of the general welfare. (Fenske Bros. *v.* Upholsterers Union, 358 Ill. 239; City of Aurora *v.* Burns, 319 id. 84.) The case last cited contains a notable exposition of the doctrine that the police power of the State is not a static or dormant concept but is sufficiently dynamic to meet the varying needs of modern society. This Court, in sustaining the validity of a zoning ordinance, observed: "With the growth and development of the State the police power necessarily develops, within reasonable bounds, to meet the changing conditions. (Public Utilities Com. *v.* City of Quincy, 290 Ill. 360.) The power is not circumscribed by precedents arising out of past conditions, but is elastic and capable of expansion in order to keep pace with human progress. Mr. Justice Holmes well defined the nature and extent of the power in Noble State

Bank *v.* Haskell, 219 U. S. 104: 'It may be said in a general way that the police power extends to all the great public needs. (Camfield *v.* United States, 167 U. S. 518.) It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' ''

Legislatures have long endeavored to promote free competition by laws aimed at trusts and monopolies such as the Anti-Trust act of this State, enacted in 1891. (Ill. State Bar Stat. 1935, p. 1235; Smith's Stat. 1935, p. 1201.) It is manifest that when the General Assembly enacted the Fair Trade act in 1935 it was attempting to modify its former policy and to adopt an economic concept which has received widespread popular approval in recent years. The gist of the theory is that the manufacturer of a trade-marked article sold in competition with articles of similar nature, who has designated a fair price at which he, as well as his distributor and retailer, can make a fair profit, has a property right in the good will towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to employ it in a misleading manner for the purpose of deceiving the public. ''The basic theory on which this concept rests,'' observed the California Supreme Court in Max Factor & Co. *v.* Kunsman, 55 Pac. (2d) 177, ''is that, from a social standpoint, price cutting, in the long run, adversely affects the public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products.'' Section 2 of the California Fair Trade act, as does section 3 of our law, prohibits manufacturers from contracting between themselves to fix re-sale prices."

To the extent that the Fair Trade act effects a change in the economic public policy of this State we have no power to interfere. It is wholly immaterial whether the individual members of this Court agree with the economic and social philosophy upon which the Fair Trade act is established, and no duty rests upon us to pass upon the wisdom of the

economic public policy which it declares. That function is wholly legislative. It is not a judicial function to lecture either the public or business. Neither is it within the province of a court to philosophize concerning economic conditions. In passing, however, we cannot help but note that many of the present legislative enactments, such as the Fair Trade acts of New York, California and Illinois, are resultants brought about because of the failure of the public, and particularly the business public, to observe those ethical principles which lie at the very foundation of fair dealing and business honesty. The shady efforts made by some to obtain an unfair advantage over others are not compatible with good citizenship nor in keeping with the best traditions of the law merchant as known at the common law. If public opinion cannot check these practices then business can expect legislatures to attempt to remedy them.

The Fair Trade act is intended to curb one of these practices by protecting the manufacturer who has built up a brand or article based on quality and excellence and preventing its use as a "loss leader" by those who would sell it for the purpose only of inveigling the public into patronizing their places of business, in the hope of obtaining a profit on other goods of inferior quality. In other words, the reputation of the one is used for the personal advantage of the other. The legislative determination of whether this statute is a proper exercise of the police power, however, is not necessarily conclusive. Whether the means employed has any real substantial relation to the public health, comfort, safety or welfare, or are essentially arbitrary and unreasonable, is a question which is subject to review by the courts. People *v.* Belcastro, 356 Ill. 144; People *v.* Rosehill Cemetery Co., 334 id. 555; Condon *v.* Village of Forest Park, 278 id. 218; People *v.* Steele, 231 id. 340.

The defendant maintains that section 2 of the Fair Trade act arbitrarily deprives him of his right to determine the price at which he will sell his commodities, and, in consequence, violates the due process clauses of the Federal and State constitutions. The right asserted is not unfettered, and is, of course, subject to the legitimate exercise of the

public power. Although we find that only two courts of last resort have passed upon the validity of Fair Trade acts such as the one in controversy, an analogous statute was held constitutional nearly twenty years ago—Ingersoll & Bro. *v.* Hahne & Co., 88 N. J. Eq. 222, 101 Atl. 1030. A statute of the State of New Jersey enacted in 1916 declared it unlawful for any merchant, firm or corporation to appropriate for his or their own use a name, brand, trademark, reputation or good will of any maker in whose product they dealt, or to discriminate against it by depreciating the value of the product in the public mind by misrepresentation as to value or quality or by price inducement, except where the goods did not carry a notice prohibiting such practice. The factual situation disclosed that the complainant, a manufacturer of watches, sold under the Ingersoll name, among others, a watch known as the "Yankee Watch." This product was advertised throughout the United Staes to be sold to the consumer at $1.35. The complainant charged that the only method by which the watches could be sold for this low price was to manufacture them in immense quantities, and that the only way to obtain customers upon a large scale was by extensive advertising; that the name "Ingersoll" and the reputation of the firm for fair dealing and reliable products was nationwide; that it was absolutely necessary, as part of the advertising and building up of the business, that a definite fixed price should form a part of the advertising for each of the products, and that all the Ingersoll watches were sold subject to a notice forbidding the retailer to dispose of them for less than a price fixed by the manufacturer. A jobber in New York disposed of the watches to a New Jersey retailer who sold them for less than the standard price. Upon the facts presented the statute was held valid. The vice-chancellor in his opinion said: "Complainant has no monopoly. Its goods are not manufactured under patents. It is constantly in competition with manufacturers of cheap watches. Not only is it morally bound as a result of its advertising to guarantee its product, but it, in fact, guarantees it in writing. The defendant makes use of the name, reputation, and guaranty of complainant for its own ul-

terior purpose and appropriates to itself the effect of the extensive advertising, upon which the complainant depends, for defendant's own profit, in violation of the contract expressed in the notice, and with no desire to benefit the public. A retailer does not sell a standard article at a loss for eleemosynary purposes." The injunction granted the complainant was subsequently made permanent in Ingersoll & Bro. *v.* Hahne & Co., 89 N. J. Eq. 332, 108 Atl. 128. The same jurist in this later case pointed out that, even in the absence of statute, contracts relating to trade and containing restraints are valid if such restraints are reasonable. In particular, the court said: "It is also well recognized that a person has a property interest in his trade-name and good will, and will, even in the absence of statute, be protected against injury to that trade-name and good will. This right has in this State been as above indicated recognized by statute. * * * In those cases in which the right to fix a re-sale price has been under consideration, the prohibition against the re-sale has been against the re-sale of the article itself. The name or trade-mark or what not has been so much an integral part of the article as that a re-sale of the article without reference to the trade-mark or trade-name would be practically impossible. In the case at bar the prohibition is not against a re-sale of the article, nor is it impracticable to re-sell the article without reference to the trade-name. * * * Complainant does not seek to retain any right in the article itself; it merely seeks to restrain the use of its trade-name and good will, except under conditions fixed by it. It may permit the purchaser of the article to use its trade-name and good will under such conditions as it sees fit. * * * It seems to me that there is a clear distinction between those cases in which the nature of the restraint is such as necessarily to affect the re-sale of the article itself and the case at bar where the nature of the restraint is not such."

The contention was made in the celebrated case of Nebbia *v.* New York, 291 U. S. 502, that because the Milk-control law of New York essayed to control prices it denied due process. The Supreme Court of the United States, in answering this contention, said: "The due process clause

makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the State is incapable of directly controlling the price itself. This view was negatived many years ago.—Munn *v.* Illinois, 94 U. S. 113.'' The court reviewed numerous decisions (German Alliance Ins. Co. *v.* Lewis, 233 U. S. 389, Griffith *v.* Connecticut, 218 id. 563, O'Gorman & Young *v.* Hartford Fire Ins. Co. 282 id. 251, Frisbie *v.* United States, 157 id. 160, Yeiser *v.* Dysart 267 id. 540, Cotting *v.* Kansas City Stockyards Co. 183 id. 79, and Stephenson *v.* Binford, 287 id. 251,) showing that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices. The court then observed: ''It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the fifth and fourteenth amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. (Wolff Packing Co. *v.* Industrial Court, 262 U. S. 522, 535.) The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest,' and 'clothed with a public use,' have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measure the State may regulate a business in

any of its aspects, including the prices to be charged for the products or commodities it sells."

The defendant, however, invokes Doubleday, Doran & Co. *v.* Macy & Co. 269 N. Y. 272, 199 N. E. 409, in which section 2 of the New York Fair Trade act, indentical with the same section of our statute assailed in the present case, was held unconstitutional as applied to the facts set forth in the complaint. The articles in question were books. The Doubleday books are not "commodities" within the accepted meaning of the term. Each book rests upon its own merit, and outside of the binding and paper content it bears no similarity to the intent of the term used in the act, namely, commodities. A general statute such as the Fair Trade act may, of course, be invalid when applied to one set of facts and clearly valid when applied to other fact situations. (Dahnke-Walker Milling Co. *v.* Bondurant, 257 U. S. 282.) The court in Max Factor & Co. *v.* Kunsman, *supra,* distinguished the Doubleday, Doran & Co. decision and held it inapplicable to the facts presented in the California case. The court said: "The plaintiffs in the New York case were Doubleday, Doran & Co. Inc., publishers, and Doubleday Doran Book Shops, Inc., retailers. The contract mentioned in the decision is one between the publishing corporation and the retailing corporation. Aside from any inference to be drawn from the similarity of names, the opinion states that the two plaintiffs, in reality, were one and the same, for it refers to 'the price which they (the plaintiffs) stipulated as a retail price in a contract between themselves.' Other language indicates the book shop corporation is merely a subsidiary and agent of the publishing company. Again, the plaintiff publishers sold the books in question to the defendant without exacting or, in so far as appears, attempting to exact, from the buyer any restriction on the price for re-sale. In other words, the producer of goods placed a retail price upon its product by its own independent action, and voluntarily sold the goods to a retailer (Macy & Co.) for re-sale without seeking, or at least obtaining, any agreement by the retailer to observe any retail price. In the action, it seeks to prevent the retailer, to whom it has sold the goods with-

out restrictions, from selling the goods at prices less than those which the producer saw fit to fix, in a contract between it and a subsidiary. The New York court accepts, for the purpose of the decision, the interpretation of the act as covering such situation, and, upon that assumption, and apparently that assumption alone, holds section 2 of the act to be unconstitutional. The plaintiffs in the New York case allege only a single contract purporting to fix the re-sale prices, and that in a pretended contract made with itself, far different from the factual set-up in the Max Factor & Co. case. Here there has been adopted a system of making written contracts, generally between producers and retail distributors, under which the products may and will be sold only to retailers who will re-sell at specified prices and have entered into contracts with the distributor to so sell such products. Practically all of the wholesale and retail druggists in California have executed such contracts, and are observing them, and the plaintiffs' distributors have refused, and will refuse, to sell such products to wholesalers or retailers who do not enter into such contracts. A contract has been tendered to defendant for execution, but defendant will not enter into the agreement. The plaintiffs therefore decline to sell the commodities to defendant, with full knowledge of the system of contracts, and the extent of the execution and compliance with their terms by the trade, has obtained Factor products 'unbeknown' to plaintiffs, and is selling them at prices less than the prices fixed by the contracts so extensively entered into by others. These facts serve to vitally differentiate the situation in New York from that here."

The defendant argues, however, that the Fair Trade act creates an arbitrary classification of persons and grants to such persons special privileges and immunities, in contravention of the constitutional guaranties invoked. He asserts that the vendors and vendees of commodities bearing the trade-mark, brand or name of the producer or owner may, under certain circumstances, fix the re-sale price thereof immune from the criminal penalties prescribed by the Anti-Trust act. The argument rests upon the assump-

tion that there is no rational basis for denying to the vendors and vendees of commodities not bearing such trademark symbols the right to fix the re-sale price without incurring the penalties of the Anti-Trust act.

The first section of the fourteenth amendment to the Federal constitution declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The fourteenth amendment does not purport to prevent a State, however, from adjusting its legislation to differences in situation, and to that end to make a justifiable classification. It merely requires that the classification shall be based on a real and substantial difference having a rational relation to the subject of the particular legislation. Nebbia *v.* New York, *supra;* Power Manufacturing Co. *v.* Saunders, 274 U. S. 490; Lindsley *v.* Natural Carbonic Gas Co. 220 id. 61; Magoun *v.* Illinois Trust and Savings Bank, 170 id. 283; Michigan Millers Ins. Co. *v.* McDonough, 358 Ill. 575; Stewart *v.* Brady, 300 id. 425.

Supplementing the equal protection provision of the fourteenth amendment, section 22 of article 4 of the constitution of this State prohibits the passage of a special law granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. The purpose of this provision is to prevent the enlargement of the rights of one or more persons and the impairment of or discrimination against the rights of others. To avoid falling within the constitutional inhibition of special legislation, the classification of subjects or objects must be based upon some reasonable and substantial difference in kind, situation or circumstance bearing a proper relation to the purposes to be attained by the statute. Michigan Millers Inc. Co. *v.* McDonough, *supra;* Jones *v.* Chicago, Rock Island & Pacific Railway Co. 231 Ill. 302.

The California Supreme Court, in passing upon the validity of the Fair Trade act of California, section 1½ of

which corresponds to the Fair Trade act of our State, (Max Factor & Co. *v.* Kunsman, *supra*,) said: "Respondent also urges that the statute denies equal protection of the laws in that it applies only to articles sold under a trade-mark or trade or brand-name, and does not apply to non-trade-marked commodities, and, among trade-marked articles, applies only to those in free and open competition with others of a similar nature. As already pointed out, it is only in reference to those commodities included within the statute that the manufacturer or producer has a property right in the nature of good will, which, in the public interest, should be protected. Such a classification is reasonable. The exclusion of trade-marked articles not in free and open competition with others of a similar nature is likewise reasonable. By that provision the public is protected from artificially high prices imposed by one with an exclusive market."

The Anti-Trust act expresses the public policy of the State against trusts and combinations organized for the purpose of suppressing competition and creating monopoly. (Harding *v.* American Glucose Co. 182 Ill. 551.) The Fair Trade act does not assume to permit restrictions on the price at which trade-marked commodities may be re-sold, irrespective of whether re-sold under the trade-mark. It permits restrictions to be placed on the use of trade-marks, names and brands—not restrictions on the price of commodities generally, except, as the plaintiff contends, to the extent that new commodities may become involved in an attempt to damage the good will built around a trade-mark, name or brand. The manifest legislative intent is the protection of the property interest in a mark, name or brand by preventing the use of the symbol by price-cutting retailers in ways likely to depreciate the property interest. Such competitors could also destroy a commodity built on merit by underselling, and thus destroying the purpose of the label intended to signify quality. As applied to the present case, by using the trade-name of a well known liquor the defendant, in effect, attracts the public to his store, and thereby induces the visitors to become the purchasers of other goods offered for sale. The defendant

thus benefits at the expense of the trade-name "Old Quaker" by using the plaintiff's products as a means to draw trade. Price-cutting primarily injures the owner of a good will which has become identified with a trade-mark, brand or name, on a commodity competing in the market with other goods of the same general class. On the other hand, the manufacturers and distributors of commodities which bear no trade symbol obviously cannot have a good will which requires the protection afforded by the Fair Trade act.

The only re-sale price maintenance, if any, permitted by the Fair Trade act is vertical. Vertical price maintenance merely enables a producer, or his distributor, to set a price at which the trade-marked commodity shall be sold to the consumer. Section I specifically provides that a commodity, in order to be subject to the contracts permitted under the Fair Trade act, must be "in fair and open competition with commodities of the same general class produced by others." Section 3 declares that the act shall not apply to any contract or agreement between producers, or between wholesalers, or between retailers, as to sale or re-sale prices. In short, it does not apply to horizontal price maintenance. The statute clearly does not even tend to legalize trusts or monopolies. It does tend to prohibit trusts and monopolies. (Ingersoll & Bro. *v.* Hahne & Co. *supra;* Fisher Flouring Mills Co. *v.* Swanson, 76 Wash. 649, 137 Pac. 144.) Application of section 2 of the statute to the facts discloses that Old Quaker whisky is in competition with other whiskies of like grade being sold in the Chicago market. No restraint rests upon the defendant inhibiting him from dealing in the competing goods of other products of the same general class sold by the plaintiff. He can freely sell whisky at a lower price than the standard price for Old Quaker. The statute merely prevents him from filching the good will associated with the descriptive mark and name "Old Quaker" for his own ulterior purposes.

Horwich *v.* Walker-Gordon Laboratory Co. 205 Ill. 497, is cited, however, to support the defendant's position that the Fair Trade act violates the constitutional limitations

against arbitrary classification. This court, in the case relied upon, held that the Trade-mark act of 1901 violated section 22 of article 4 of our constitution. Section 2 of the statute declared it illegal for any person, without the written consent of the owner, to sell certain receptacles bearing the trade-mark, brand or name of the owner. Section 3 made the possession by any junk dealer of receptacles bearing registered trade-marks, prima facie evidence that such possession was unlawful. The fourth section prescribed criminal penalties for the violation of the provisions of the act. An action was brought under section 6, which provided that any person might be enjoined from violating the second section. The court pointed out that the purpose of the statute was to facilitate the recovery of the receptacles described in the first section which had passed from the possession of their owners to others and when the owners desired to recover summarily. On the other hand, the Fair Trade act of 1935 has for its major objective the preservation and protection of the property interest of the producer and his distributors in the good will represented by brands, trade-marks and trade-names. The law is also designed to protect the consumer's interests. The legislature by this act has attempted to benefit alike the producer, the distributor and the public. It is apparent that the objective of the Fair Trade act is not some purely personal goal, such as the summary recovery of certain types of personal property. The Horwich case, it is true, dealt with trade-marks, but solely in their character as indicia of ownership. In the present case the statute attacked deals not only with trade-marks in that respect, but also with the good will built up by a producer or distributor around a trade-mark, trade-name or brand, and provides that certain conduct with respect to the use of such trade-marks, names or brands constitutes unfair competition.

Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, is also invoked to sustain the defendant's position. The Illinois Trust act of June 20, 1893, prohibited trusts or combinations in restraint of trade or competition. Section 9 excepted from the provisions of the act agricultural products

or livestock while in the hands of the producer or raiser. Section 10 provided that the purchaser of any article or commodity from such a trust or combination should not be liable for the price and might plead the act as a defense to any action therefor. Suit was brought to recover for the sale of sewer pipe and the statute was pleaded as a defense. The United States Supreme Court held that the discrimination created by the ninth section rendered the act repugnant to the provisions of the fourteenth amendment, respecting the equal protection of the laws.

The defendant argues that no distinction can be drawn between the classification condemned in the Connolly case, supra, and that provided by the Fair Trade act. The argument rests upon the premise that the Fair Trade act, in like manner as the Trust act of 1893, creates an unfair and arbitrary classification, in flagrant violation of the constitutional guaranty of equal protection of the laws. It is urged that the new law attempts to legalize business practices which have long been deemed illegal under the Anti-Trust act. The arguments are based upon erroneous premises and therefore must fall. The Anti-Trust act was never intended to interfere with the protection given to the good will established around the use of a trade-mark, brand or name. Obviously, it does not even purport to render illegal the conduct sanctioned by the Fair Trade act. Moreover, a retailer such as the defendant is not expressly prohibited from removing the trade symbol and selling the whisky which he owns, at whatever price he pleases. Manifestly, there can be no interference with the enforcement of the Anti-Trust law under such circumstance.

An insuperable objection to the validity of the Fair Trade act, the defendant insists, is that the provisions of the statute are so incomplete, vague, indefinite and uncertain that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application. Statutes vulnerable to the objection stated have been declared unconstitutional as denying due process. (Champlin Refining Co. *v.* Commission, 286 U. S. 210; Parks *v.* Libby Owens-Ford Glass Co., 360 Ill. 130.) On the other hand, where the words assailed, taken in connection with the con-

text, are commonly understood, their use does not render a statute invalid. (People *v.* Huls, 355 Ill. 412.) Furthermore, the legislature is not required to define words in common and daily use. (People *v.* Lloyd, 304 Ill. 23.) A statute is sufficiently certain if the words and phrases employed have a technical or other special meaning well enough known to enable those within their reach to correctly apply them. (Hygrade Provision Co. *v.* Sherman, 266 U. S. 497; Omaechevarria *v.* Idaho, 246 id. 343; People *v.* Mueller, 352 Ill. 124; Amberson *v.* Amberson, 349 id. 249; Kowalczyk *v.* Swift & Co., 329 id. 308.) In the light of these authorities the following words and expressions segregated and scrutinized by the defendant are not so ambiguous as to render the Fair Trade act void for uncertainty: "Articles of standard quality," employed only in the title; the phrase "in fair and open competition," in section I; the words "any commodity," and the expression "any contract entered into pursuant to the provisions of section I," in section 2.

The remaining contention which requires consideration is that section 2 of the Fair Trade act contravenes section I of article 4 of the constitution of this State, which provides that the legislative power shall be vested in the General Assembly. It is argued that section 2 delegates to such individuals as choose to avail themselves of the benefits of the statute the power to regulate the prices of commodities sold by others. The contention, and the argument supporting it, rest upon the unwarranted assumption that the Fair Trade act is primarily, and not incidentally, a price-fixing statute. In referring to the purpose of the California Fair Trade act the Supreme Court of that State said that the act did not merely prohibit price-cutting for the purpose of regulating prices, but also prohibited the practice in a legitimate legislative attempt to afford protection to the validly-acquired rights of others. (Max Factor & Co. *v.* Kunsman, *supra.*) The Fair Trade act of this State does not even attempt to fix or delegate to others the right to fix the price at which any commodity may be sold in the market. It is true, however, that resale price maintenance laws, such as the Fair Trade acts of California, New York

and Illinois, constitute permissive or conditional legislation. Specifically, our statute does not contain any mandatory requirements, nor does it fix the prices which are to be imposed. No question of governmental price-fixing is, in consequence, involved. In other words, the law would remain wholly inefficacious unless the conditions which it prescribes are met. The plaintiff, for example, is not commanded to operate under it. Only in the event that manufacturers or distributors elect to avail themselves of its provisions does the statute come into actual operation. This does not mean that the act took effect upon the approval of any authority other than the legislative branch of our State government. (Commonwealth *v.* Goldburg, 167 Ky. 96, 180 S. W. 68.) When the Fair Trade act was passed by the General Assembly it was a complete statute, in no manner dependent for approval or disapproval by any person or group of persons. The defendant's contention that the statute unlawfully delegates legislative power is without merit.

Two objections interposed in the trial court, namely, that the Fair Trade act violates the constitutional provisions against legislation impairing the obligation of contracts, and that it constitutes an invalid attempt to regulate the sale of commodities in interstate commerce, have not been argued on this appeal. They do not, therefore, require consideration.

The decree of the trial court is right, and it will be affirmed.

Decree affirmed.

EXHIBIT "B".

Docket No. 23531—Agenda 37—April, 1936.

SEAGRAM-DISTILLERS CORPORATION, *Appellee*,

v.

OLD DEARBORN DISTRIBUTING COMPANY, *Appellant*.

(363 Ill. 610.)

MR. JUSTICE JONES delivered the opinion of the court:

At the suit of the Seagram-Distillers Corporation the Circuit Court of Cook County permanently enjoined the Old Dearborn Distributing Company from wilfully and knowingly advertising, offering for sale or selling "Seagram's" or "Kessler's" products in this State at less than the prices stipulated by plaintiff from time to time, under the Fair Trade act, in accordance with the terms of contracts made pursuant to that act between plaintiff and distributors or retailers.

There is no material dispute as to the facts. Plaintiff, a Delaware corporation licensed to do business in Illinois, deals in alcoholic beverages solely at wholesale. It does not manufacture, but buys, Seagram's whiskys and gins and Kessler's blended whiskys from the producers, Joseph E. Seagram & Sons, Inc., and affiliated corporations. Its place of business in this State is in the City of Chicago. It has been so engaged in business since July, 1934. The commodities it sells bear labels and trade-marks and they are in fair and open competition with commodities of the same general class produced by others. Defendant is a corporation operating four retail liquor stores in the City of Chicago. Its charter powers include sales at both wholesale and retail. Plaintiff's sales in Chicago have been confined to wholesale distributors. It has never sold any of the products in controversy to defendant but has sold other liquors to it. Contracts in conformity with the terms of the Fair Trade Act have been executed between plaintiff and certain distributors and between plaintiff and certain

numerous Illinois retailers, although plaintiff does not sell beverages direct to any retailer. One of such contracts was executed by plaintiff and signed by defendant's secretary and treasurer. The contracts provide that the Seagram products shall not be sold, advertised or offered for sale in Illinois below the prices stipulated by plaintiff. Defendant sold such merchandise at cut prices but at a profit to itself. It continued to do so after plaintiff's demand that it cease such practice. On account of such price-cutting, plaintiff and other retailers dealing in Seagram products suffered a diminution of sales during the price-cutting period. Some dealers took the products from display, and some of them notified plaintiff they could not compete with defendant and would discontinue handling Seagram products unless the price-cutting was stopped. Defendant was a party to breaches of other fair trade contracts between plaintiff and certain distributors, and continued the price-cutting throughout the trial of the instant case.

Defendant contends that the Fair Trade Act (Ill. State Bar Stat. 1935, chap. 140, pars. 8-11), violates several specified provisions of the State and Federal constitutions, the Sherman Anti-Trust Act, the Anti-Trust Act of this State, and the Federal Trade Commission act; that re-sale price-maintenance contracts are invalid under such constitutional and statutory provisions and are void at common law as unfair competition. These contentions are answered adversely to defendant's claim in Triner Corp. *v.* McNeil, (No. 23475), decided at the present term of this court. That opinion sets out the pertinent provisions of the act, and they need not be repeated here.

The claim that the transactions between plaintiff and defendant are interstate transactions must likewise be denied. Plaintiff maintains a warehouse in Chicago and all of its purchases are delivered there from the producers. The products are not shipped to plaintiff's customers from outside the State but are delivered from its Chicago warehouse. They are in no sense interstate transactions. Rudin *v.* King-Richardson Co., 311 Ill. 513; Schecter Poultry Corp. *v.* United States, 295 U. S. 495.

Neither does the act violate section 13 of article 4 of the constitution of this State by amending the Illinois Anti-

Trust act without including that subject in the title. The Fair Trade act is complete within itself and does not purport, either in its title or in the body thereof, to amend or revive any other act. Even though it may by implication modify or repeal prior existing statutes, that fact does not constitute a violation of the constitutional provisions. The constitution does not require that all legal effects of an act, such as a repeal by implication of a former act, shall be stated in the title. Where the subject of the act itself is embraced in the title all legal consequences necessarily flowing from it will, for the purpose of constitutional requirement, be regarded as embraced in the title. Village of Averyville *v.* City of Peoria, 335 Ill. 106; People *v.* Borgeson, id. 136.

It is argued that the facts show a conspiracy to stifle competition and fix prices in restraint of trade, and that therefore plaintiff comes to court with unclean hands and cannot maintain its action. There is no showing, nor even an attempt to show, that plaintiff has entered into an agreement or understanding with any other person or corporation in a like situation to maintain or control the sale price or re-sale price of any commodity handled by it. Nor does the fact that defendant is a wholesaler take the transactions without the terms of the statute. It does not deal directly with plaintiff. If it desired to purchase at wholesale from plaintiff it would be in the same class as other distributors to whom plaintiff sells. The relation between plaintiff and the wholesalers to whom it sells is different from the relation among such purchasing wholesalers. It is the same relation that the wholesaler bears to the retailers to whom he sells. Contracts between plaintiff and wholesale distributors, or between distributors and retailers, are denominated vertical price-fixing contracts. Such contracts are permitted by the statute. Contracts between producers or between wholesalers or between retailers as to sale or resale prices are denominated horizontal price-fixing contracts and are not within the terms of the statute because of their character as combinations in restraint of trade. Such contracts are uniformly held invalid. The admitted facts show that the transactions in controversy belong in the class of

vertical price-fixing contracts, which are not subject to the contention urged.

We are not concerned with the claim that the contract between plaintiff and defendant was not executed by the defendant's proper officers or that it is invalid for lack of mutuality. Section 2 of the Fair Trade Act applies to wilfully and knowingly advertising, offering for sale or selling any commodity at less than the prices stipulated in any contract entered into pursuant to the provisions of section 1 of the act, whether the person so doing is or is not a party to such contract.

We are of the opinion that the Fair Trade Act is valid and that under the facts in this record plaintiff was entitled to equitable relief by injunction.

The decree of the Circuit Court was correct and is accordingly affirmed.

Decree Affirmed.

STATE OF ILLINOIS,
County of Cook, ss:

William Rosenthal, of Chicago, Illinois, being duly sworn says that he is an Attorney at Law, that at Chicago, Illinois, on July 22nd, 1936, he served a true copy of the foregoing motion, and statement as to jurisdiction on appeal upon Mayer, Meyer, Austrian and Platt, attorneys for the appellee, by delivering a true copy thereof to Richard Mayer.

WILLIAM ROSENTHAL.

Subscribed and sworn to before me this 22nd day of July, 1936.

[SEAL.]

DAVID COHL,
Notary Public.

My commission expires August 18th, 1938.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 226

OLD DEARBORN DISTRIBUTING COMPANY,
a corporation,
(Defendant) Appellant,

vs.

SEAGRAM-DISTILLERS CORPORATION,
a corporation,
(Plaintiff) Appellee.

BRIEF OF APPELLANT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 226

OLD DEARBORN DISTRIBUTING COMPANY,
a corporation,
(Defendant) Appellant,

vs.

SEAGRAM-DISTILLERS CORPORATION,
a corporation,
(Plaintiff) Appellee.

BRIEF OF APPELLANT.

I.

OFFICIAL REPORT OF OPINIONS BELOW.

The official opinions of the Supreme Court of Illinois in this case are reported in Volume 363, Illinois Reports, at pages 559, and 610.

II.

STATEMENT OF THE CASE.

This is an appeal by the (defendant) appellant, Old Dearborn Distributing Company, a corporation, from the final judgment of the Supreme Court of Illinois, sustaining the constitutionality of the "Fair Trade Act" hereinafter set forth in full, and affirming a final decree of the Circuit Court of Cook County, Illinois, entered November 30, 1935, after trial before the court without a jury, permanently restraining and enjoining the (defendant) appellant amongst other things from wilfully and knowingly advertising, offering for sale, or selling certain branded liquors sold under the trade name of "Seagram" products and "Kessler" products anywhere in Illinois at less than the prices stipulated by (plaintiff) appellee from time to time under said "Fair Trade Act" of Illinois (Chapter 140, Secs. 8 to 11, Ill. Rev. Stats. 1935, p. 3091) in accordance with the terms of contracts made pursuant to the Act between (plaintiff) appellee and persons other than the parties hereto.

A. The Pleadings.

The complaint sets up that the plaintiff, a sales agency for liquors manufactured by two corporations, Jos. E. Seagram & Sons Ltd., and the same Inc., entered into a contract with the (defendant) appellant, similar in form to contracts with others, under and pursuant to the "Fair Trade Act" of Illinois, wherein and whereby the defendant agreed to resell any and all liquors sold by the (plaintiff) appellee in Illinois, no matter from whom purchased by the (defendant) appellant, at not less than the minimum resale price fixed and maintained by the (plaintiff) appellee from time to time, all in accordance with other Fair

Trade contracts executed by (plaintiff) appellee with others than the (defendant) appellant as a part of a system of resale price maintenance operated by (plaintiff) appellee; that the (defendant) appellant violated the terms of the "Fair Trade Act" and the provisions and terms of the alleged contract with the (plaintiff) appellee, and its contracts with others by selling below the minimum resale prices so fixed by (plaintiff) appellee. The complaint prayed for equitable relief by way of injunction to prevent (defendant) appellant from selling below the prices stipulated in the resale price maintenance contracts of the (plaintiff) appellee in question.

Plaintiff contended that Section 2, of the "Fair Trade Act" is constitutional as applied to the instant cause, and that it was entitled to the injunction irrespective of the validity of its purported contract with (defendant) appellant. The Illinois Supreme Court agreed with this contention.

The answer admits that the (defendant) appellant sold merchandise in Illinois, of the type and description set forth in the complaint, and of which the plaintiff was the original owner, below prices stipulated in the resales agreements of the (plaintiff) appellee with others; that the defendant purchased these liquors so sold by it at these reduced prices from persons other than the plaintiff; that the purported contract with the plaintiff was executed without authority of the defendant corporation, that it was *ultra vires;* that the purported contract is without consideration and violative of the provisions of the Constitutions of Illinois and the United States of America; that the Illinois "Fair Trade Act," Chapter 140, Secs. 8 to 11, inclusive, Ill. Rev. Stats. 1935, page 3091, is unconstitutional and void because it among other things violates Section 1 of the Fourteenth Amendment to the Constitution of the

United States of America as well as certain designated provisions of the Constitution of the State of Illinois; that the purported contract with the (defendant) appellant lacked mutuality and was void; that the entire agreement and system of contracts for resale price maintenance adopted by the (plaintiff) appellee is and was contrary to the public policy of the State of Illinois and violative of the anti-trust act of the state; that the (plaintiff) appellee is not entitled to equitable relief because it comes into a court of equity with unclean hands; that the acts of the (plaintiff) appellee in combination with others is in violation of the Sherman Anti-Trust Act, and that the Illinois "Fair Trade Act" is an unreasonable burden on interstate commerce and therefore void. It concludes with the usual prayer for the dismissal of the complaint for want of equity and for the denial of the injunctive relief prayed thereunder.

The plaintiff filed a short reply denying all the affirmative allegations of new matter contained in the answer.

(1) Plaintiff's Theory.

Plaintiff's theory of the case is that under and pursuant to the Illinois "Fair Trade Act," it has a valid and binding contract with the defendant for the maintenance of resale prices of all merchandise distributed by the plaintiff in Illinois, and subsequently acquired by the defendant, whether from the plaintiff or from other persons, and that in the event that the contract be for any reason void, still under Section 2 of the Illinois "Fair Trade Act," the defendant whether or not it be in contractual relationship with the plaintiff is compelled to abide by the provisions of the resale price maintenance contracts made by the plaintiff with persons other than the defendant; that the acts of the defendant in selling its merchandise at reduced

prices is actionable in equity to the extent of permitting the issuance of injunctive relief because of the declared legislative fiat that the acts of the defendant constitute unfair competition, and inflict irreparable injury upon the good will of the plaintiff, and its brand of merchandise sold under its name, which was the theory adopted by the Supreme Court of Illinois in 363 Ill. 610, sustaining the constitutionality of the statute.

(2) Defendant's Theory.

The defendant proceeds on the theory that it has no contract with the plaintiff whatsoever; that the contract if any there be, is void because in violation of the public policy of Illinois, its anti-trust Act, is without consideration, unilateral, lacks mutuality, and is not permissive of injunctive relief; that the Illinois "Fair Trade Act" is in all its provisions unconstitutional and void because it is contrary to the express provisions of the State Constitution as well as the Fourteenth Amendment to the Constitution of the United States of America; and that the acts of the plaintiff are illegal, in violation of the Sherman Anti-Trust Law, the Clayton Act, the Fair Trade Act, and the common law; and that the conduct of the plaintiff is illegal and of such nature as to deny it any injunctive relief.

B. The Facts.

We state the facts from the opinion of the court in 363 Ill. 610:

> "There is no material dispute as to the facts. Plaintiff a Delaware corporation licensed to do business in Illinois, deals in alcoholic beverages solely at wholesale. It does not manufacture, but buys, Seagram's whiskys and gins and Kessler's blended whiskys from the producers, Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc., and affiliated corpo-

rations. Its place of business in this State is in the city of Chicago. It has been so engaged in business since July, 1934. The commodities it sells bear labels and trade-marks, and they are in fair and open competition with commodities of the same general class produced by others. Defendant is a corporation operating four retail liquor stores in the city of Chicago. Its charter powers include sales at both wholesale and retail. Plaintiff's sales in Chicago have been confined to wholesale distributors. It has never sold any of the products in controversy to the defendant but has sold other liquors to it. Contracts in conformity with the terms of the Fair Trade act have been executed between plaintiff and certain distributors and between plaintiff and certain numerous Illinois retailers, although plaintiff does not sell beverages direct to any retailer. One of such contracts was executed by plaintiff and signed by defendant's secretary and treasurer. The contracts provide that the Seagram products shall not be sold, advertised or offered for sale in Illinois below the prices stipulated by plaintiff. Defendant sold such merchandise at cut prices but at a profit to itself. It continued to do so after plaintiff's demand that it cease such practice. On account of such price-cutting, plaintiff and other retailers dealing in Seagram products suffered a diminution of sales during the price-cutting period. Some dealers took the products from display, and some of them notified plaintiff they could not compete with the defendant and would discontinue handling Seagram products unless the price-cutting was stopped. Defendant was a party to breaches of other fair trade contracts between plaintiff and certain distributors, and continued the price-cutting throughout the trial of the instant case."

C. The Decree.

The decree found (1) the court to have jurisdiction; (2) that plaintiff had proceeded in accordance with law, that the material allegations of the complaint were proven, and the similar allegations of the answer not proved; and (3)

that the equities were with the plaintiff and it was entitled to the relief prayed.

The decree then enjoins the defendant from wilfully and knowingly advertising, offering for sale or selling the merchandise of the nature and kind described in the complaint, and for convenience herein denominated as "Seagram's products" anywhere in Illinois at less than the prices stipulated by the plaintiff from time to time under the Illinois "Fair Trade Act" in accordance with the terms and provisions of contracts made pursuant to the Act, between plaintiff and its distributors or between plaintiff and retailers, which contracts, at the time of the filing of the complaint herein were, or now are or may hereafter be in force in Illinois relating to the sale or resale of any of plaintiff's beverages. (Rec. 1.)

III.

SPECIFICATION OF ERRORS.

(A) The Supreme Court of Illinois erred in giving judgment, affirming the judgment of the Circuit Court of Cook County, Illinois, holding the Illinois "Fair Trade Act, to-wit: Chapter 140, Secs. 8 to 11, inclusive, Ill. Rev. Stats. 1935, to be a constitutional act, and in failing to render judgment for the defendant because said Illinois Fair Trade Act" violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the defendant of its liberty and property without due process of law, and denies to it the equal protection of the laws, all as set forth in the Assignment of Errors Numbers 1 to 12, inclusive, and is beyond the power of the legislature of the State of Illinois to enact.

SUMMARY OF ARGUMENT.

A.

The Illinois Fair Trade Act deprives the defendant and appellant retailer of liberty and property without due process of law, and denies to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

I.

1. **The basic statute—its analysis—gist of plaintiff's cause of action.**

   A. The nature, purposes and reasons for the enactments and legislative history of the statute is found in the attempt to destroy alleged predatory price cutting.

   No. 23—Final legislative synopsis and digest of the 59th General Assembly of Illinois.

   Nebbia v. *New York*, 291 U. S. 502.

   The Statute—Chapter 140, Secs. 8-11, Ill. Rev. Stats. 1935.

   (a) The economic point of view.

   Triner Corp. v. *McNeil*, 363 Ill. 559.

   Max Factor & Co. v. *Kunsman*, 55 Pac. (2d) 177.

   Chemical Foundation Brochure No. 7. The only real security.

   (b) Gist of plaintiff's alleged cause of action.

   Seagram Distillers Corporation v. *Old Dearborn Distributing Co.*, 363 Ill. 610.

   Analysis of the Statute.

(c) Constitutional aspect of the statute.

Champlin Refining Co. v. *Comm.*, 286 U. S. 210.

(1) Constitutionality.

Historical Background.

Dr. Miles Medical Co. v. *Park*, 220 U. S. 373 (1911).

Act of July 2, 1890, c. 647, 26 Stat. at L. 209; 15 U. S. C., par. 1.

Boston Store v. *American Graphophone Co.*, 246 U. S. 8.

Victor Talking Machine Co. v. *Kennedy*, 271 Fed. 810 (C. C. A. (3d) 1921).

Bobbs-Merrill Co. v. *Straus*, 210 U. S. 339.

(2) The opinion of economists or the legislature that price-fixing is socially desirable does not establish the constitutionality of the statute.

Schechter v. *U. S.*, 295 U. S. 495.

R. R. Retirement Board v. *Alton R. R.*, 295 U. S. 330.

II.

The two sections of the Fair Trade Act are interdependent and part of one legislative system designed to accomplish one object, i. e., the elimination of price cutting. If either subsection is unconstitutional, the whole act fails.

Carter v. *Carter Coal Co.*, Vol. 80—No. 15, pages 749-788 U. S. Supreme Court (Law Ed.) Adv. Op.

Winter v. *Barrett*, 352 Ill. 441.

Garst v. *Hall & Lyon & Co.*, 179 Mass. 588 (1901).

Riccio v. *Hoboken*, 69 N. J. L. 649, 662.

III.

The Illinois "Fair Trade Act" deprives retailers of liberty and property without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution.

A. Constitutional Principles.

14th Amendment Constitution of the United States.

Tyson v. *Banton*, 273 U. S. 418, 429.

Buchanan v. *Warley*, 245 U. S. 60, 74.

Liggett Co. v. *Baldridge*, 278 U. S. 105, 111.

Allgeyer v. *Louisiana*, 165 U. S. 578, 589.

Nebbia v. *N. Y.*, 291 U. S. 502, 503.

New State Ice Co. v. *Liebman*, 285 U. S. 262, 277.

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522, 537.

B. Since the effect and purpose of Section 2 of the statute is the fixing of prices on ordinary commodities sold by ordinary businesses, it is not within the scope of any constitutional power of the legislature.

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522.

Tyson v. *Banton*, 273 U. S. 418.

Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1.

Ribnick v. *McBride*, 277 U. S. 350.

Williams v. *Standard Oil Co.*, 278 U. S. 235.

People v. *Gillson*, 109 N. Y. 389.

People v. *Steele*, 231 Ill. 340.

People v. *Nebbia*, 262 N. Y. 264, 265.

People v. *Nebbia*, 291 U. S. 502, 523, 526.

New State Ice Co. v. *Liebman*, 285 U. S. 262, 277, *et seq.*

United Theatre Offices Inc. v. *Banton*, 47 Sup. Ct. Rep. 426; 273 U. S. 418.

German Alliance Ins. Co. v. *Kansas*, 233 U. S. 389, 414.

Block v. *Hirsh*, 256 U. S. 135, 137.

Darweger v. *Staats*, 267 N. Y. 290, 308.

People v. *Budd*, 177 N. Y. 1, 27.

People v. *Budd*, 143 U. S. 517, 532.

Adams v. *Tanner*, 244 U. S. 590, 594, 61 L. Ed. 1336, 1342, L. R. A. 1917-E 1163, 37 Sup. Ct. 662, Ann. Cas. 1917-D 973.

3 Williston on Contracts, page 2907, Sec. 1649.

Dr. Miles Med. Co. v. *Park, etc.*, 220 U. S. 373 (1911).

Bobbs-Merrill Co. v. *Straus*, 210 U. S. 339 (1908).

Bauer v. *O'Donnell*, 229 U. S. 1.

19 Columbia Law Rev. 265.

IV.

Legislation identical with Section 2 of the Fair Trade Act has been held invalid by the court of last resort in New York and held valid by the court of last resort in California by a divided court, two judges filing dissenting opinions.

Doubleday Doran & Co. v. *R. H. Macy & Co.*, 269 N. Y. 272; 199 N. E. 409.

Max Factor & Co. v. *Kunsman*, 91 Cal. Dec. 345; 55 Pac. (2d) 177.

Munn v. *Illinois*, 94 U. S. 113.

Williams v. *Standard Oil Co.*, 278 U. S. 235.

Tyson v. *Banton*, 273 U. S. 418 (1927).

Ribnick v. *McBride*, 277 U. S. 350 (1928).

Nebbia v. *N. Y.*, 291 U. S. 502 (1934).

Triner Corp. v. *McNeil*, 363 Ill. 559, 568.

A. The Fair Trade Act of Illinois is unconstitutional because:

(1) Discriminatory.

(2) Indefinite.

U. S. v. *Cohen Grocery Co.*, 255 U. S. 81, 89.

Connelly v. *General Construction Co.*, 269 U. S. 385, 390.

Cline v. *Frink Dairy Co.*, 274 U. S. 445, 453.

(3) The price fixed is left to the uncontrolled dictates of the producer.

Washington v. *Roberge*, 278 U. S. 116.

Panama Refining Co. v. *Ryan*, 293 U. S. 388.

(4) The act covers too much territory.

Tyson v. *Banton*, 263 U. S. 418.

Ingersoll v. *Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030; 89 N. J. Eq. 322, 108 Atl. 128.

Wisconsin Act, Sec. 133.25, Chap. 52, L. 1935.

V.

The statute is an unconstitutional delegation of legislative power to individuals, therefore denying to retailers the equal protection of the laws as well as due process of law.

Cooley—Constitutional Limitations, 8th Ed., Vol. 1, pp. 232-235, pp. 816.

Schechter Poultry Corp'n v. *U. S.*, 295 U. S. 495. (Sec. 133.185 to 133.27 Wis. Stats. 1935.)

Nebbia v. *N. Y.*, 291 U. S. 502.

Nectow v. *Cambridge*, 277 U. S. 72.

Adams v. *Tanner*, 244 U. S. 590.

Burns Baking Co. v. *Bryan*, 264 U. S. 594.

Weaver v. *Palmer Bros. Co.*, 270 U. S. 594.
Baltimore v. *Radecke Co.*, 49 Md. 217.
Yick Wo v. *Hopkins*, 118 U. S. 356.
U. S. v. *Yount*, 267 Fed. 861, 863.
Leeper v. *Texas*, 139 U. S. 462.
Giozza v. *Tierman*, 148 U. S. 657.
Ch. 38, Sec. 598, Ill. Rev. Stats. 1935.
Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540.
Triner Corp. v. *McNeil*, 363 Ill. 559, 580.
Ch. 140, Sec. 7, Ill. Rev. Stats. 1935.
Tyson v. *Banton*, 273 U. S. 418.
Horwich v. *Walker Gordon Laboratory*, 205 Ill. 497.
Lippman v. *People*, 175 Ill. 101.
Dr. Miles Medical Company v. *Park*, 220 U. S. 373.
Adkins v. *Children's Hospital*, 261 U. S. 525.

VI.

The means provided by the statute to achieve its purpose are unreasonable, arbitrary and discriminatory, and are wholly irrelevant to any legislative purpose.

Nebbia v. *New York*, 291 U. S. 502, 537, 539.
Nectow v. *Cambridge*, 277 U. S. 183.
Adams v. *Tanner*, 244 U. S. 590.
Burns Baking Co. v. *Bryan*, 264 U. S. 504.
Weaver v. *Palmer Bros. Co.*, 270 U. S. 402.
Schlessinger v. *Wisconsin*, 270 U. S. 230.
Liggett v. *Baldridge*, 278 U. S. 105.
Yick Wo v. *Hopkins*, 118 U. S. 356.
Washington v. *Roberge*, 278 U. S. 116.

A. The means adopted by the Legislature to achieve its purpose are unreasonable, arbitrary and discriminatory.

(a) The challenged statute unconstitutionally vests in private persons arbitrary power to fix prices at which another may sell his own property.

(b) The legislature cannot constitutionally give to private persons such unlimited power over the liberty and property of other persons as this statute attempts to grant. The power is too unrestrained and too susceptible of abuse.

Eubank v. *Richmond*, 226 U. S. 137, 143, 144.
Washington v. *Roberge*, 278 U. S. 116, 121-122.
Yick Wo v. *Hopkins*, 118 U. S. 356, 369.

(c) The argument that competition between brands will prevent all arbitrary, unreasonable and discriminatory price-fixing is without merit.

Bourjois Inc. v. *McGowan*, 12 Fed. Supp. 787.
Encylopedia Brittanica; "Publishing".
Federal Trade Comm. Report on Resale Price Maintenance, 1931, p. 157.
"Dangerous Trends under the N. R. A.," Prof. Nystrom, p. 8.

B. The means adopted by the legislature in the challenged statute are wholly irrelevant to any constitutional legislative purpose.

New State Ice Co. v. *Liebman*, 285 U. S. 262, 280.
Meyer v. *Nebraska*, 262 U. S. 390.
Pierce v. *Society of Sisters of the Holy Name*, 268 U. S. 510.
Buchanan v. *Warley*, 245 U. S. 60.
Schechter Poultry Corp'n v. *U. S.*, 79 Law Ed. 888.

(a) If it be assumed, contrary to fact, that the prevention of the use of "Loss Leaders" is the purpose of the statute, the means adopted for the prevention of such practices are wholly irrelevant to that purpose.

Brookings Institute: "Effect of Abolishing Loss Leaders."

Federal Trade Comm. Report on Resale Price Maintenance, 1931, p. 9.

Tyson v. *Banton*, 273 U. S. 418.

Adams v. *Tanner*, 244 U. S. 590, 594, 595.

Fairmont Creamery Co. v. *Minn.*, 274 U. S. 1, 9, 10.

People ex rel. Moskowitz v. *Jenkins*, 202 N. Y. 53.

City of Carrolton v. *Bazzette*, 159 Ill. 284, 299, 300.

People v. *Gillson*, 109 N. Y. 389, 399.

(b) If it be assumed, contrary to fact that the prevention of predatory price-cutting (meaning thereby price-cutting with deliberate intent to injure other persons) is the real object of the statute, then the statute in applying indiscriminately to all sales of all commodities at a price less than that fixed by a manufacturer, has transcended the constitutional limits of the legislative power.

Fairmont Creamery Co. v. *Minn.*, 274 U. S. 1.

Central Lumber Co. v. *So. Dak.*, 226 U. S. 157.

(c) The constitutionality of this statute cannot be sustained merely because it confines price-fixing to goods bearing the producer's name, trade-mark or brand.

(1) The sole function of a trade-mark is to designate goods as the product of a particular trader and to protect his good will against the sale of another's product as his.

United Drug Co. v. *Rectanus Co.*, 248 U. S. 90, 97, 98.

Prestonettes Inc. v. *Coty*, 264 U. S. 359, 368.

Russia Cement Co. v. *Frauenhar*, 133 Fed. 518.

Gorham Mfg. Co. v. *Emery Bird Thayer Dry Goods Co.*, 92 Fed. 774, aff'd 104 Fed. 243.

Vitascope v. *United States Phonograph Co.*, 83 Fed. 30.

John D. Park & Sons Co. v. *Hartman*, 153 Fed. 24.

Dr. Miles Medical Co. v. *Park*, 220 U. S. 373.

Boston Store v. *American Graphophone Co.*, 246 U. S. 8.

Federal Trade Comm. v. *Beech-Nut Packing Co.*, 257 U. S. 441.

Straus v. *Victor Talking Machine Co.*, 243 U. S. 490.

Bauer v. *O'Donnell*, 229 U. S. 1.

Bobbs-Merrill v. *Straus*, 210 U. S. 339.

(2) The constitutionality of the statute cannot be sustained by giving to a trade-mark (or brand or name that is not a trade-mark) a legal effect which in its nature, it cannot have.

Fairmont Creamery Co. v. *Minn.*, 274 U. S. 1.

People ex rel. Moskowitz v. *Jenkins*, 202 N. Y. 53.

(3) The constitutionality of this statute cannot be sustained under the guise of protecting trade-mark owner's good will.

People ex rel. Moskowitz v. *Jenkins*, 202 N. Y. 53.

New State Ice Co. v. *Liebman*, 285 U. S. 262.

Buchanan v. *Warley*, 245 U. S. 60.

U. S. v. *Hoosac Mills*, 297 U. S. 1.

(4) The constitutionality of the statute cannot be sustained by the argument that a retailer buying branded goods with knowledge of an existing contract between the manufacturer and someone else fixing a resale price on other goods bearing the brand takes subject to the price restriction.

Straus v. *Victor Talking Machine Co.*, 243 U. S. 490, 500, 501.

Buchanan v. *Warley*, 245 U. S. 60.

(5) The constitutionality of the statute cannot be sustained by denominating the imposed price restrictions as "equitable servitudes."

Garst v. *Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219.

Park & Sons v. *Hartman*, 153 Fed. 24, 39.

(6) The constitutionality of the statute cannot be sustained by the argument that it merely gives a cause of action against persons inducing a breach of contract.

Lumley v. *Gye*, 2 El. & Bl. 216.

Lamport v. *4175 Broadway Inc.*, 6 Fed. Supp. 923.

Sweeney v. *Smith*, 167 Fed. 385, aff'd 171 Fed. 645, certiorari denied, 215 U. S. 600.

(7) The constitutionality of the statute cannot be sustained on the theory that the statute is reasonable because it gives a cause of action only to a "person damaged."

1 Sutherland, Damages, 4th Ed., Sec. 2, 3.

Buchanan v. *Warley*, 245 U. S. 60.

C. If it be assumed, contrary to fact, that the prevention of unfair competition is the purpose of the statute, the means of preventing such practices are wholly irrelevant to the purpose.

People ex rel. Moskowitz v. *Jenkins*, 202 N. Y. 53.

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522, 536.

Home Building & Loan Ass'n v. *Blaisdell*, 290 U. S. 398, 442.

Williams v. *Standard Oil Co.*, 278 U. S. 235.

Fairmont Creamery Co. v. *Minn.*, 274 U. S. 1.

People v. *Gillson*, 109 N. Y. 389.

New State Ice Co. v. *Liebman*, 285 U. S. 262.

Tyson v. *Banton*, 273 U. S. 418.

Sears, Roebuck Co. v. *Federal Trade Comm.*, 258 Fed. 307.

Sinclair Refining Co. v. *Federal Trade Comm.*, 276 Fed. 686, aff'd 261 U. S. 463.

S. S. Kresge Co. v. *Champion Spark Plug Co.*, 3 Fed. (2d) 415.

Dr. Miles Medical Co. v. *Park*, 220 U. S. 373.

Boston Store v. *American Graphophone Co.*, 246 U. S. (8).

Federal Trade Comm. v. *Beechnut Packing Co.*, 257 U. S. 441.

Straus v. *Victor Talking Machine Co.*, 243 U. S. 490.

Brooking's Institution Survey.

ARGUMENT.

A.

The Illinois Fair Trade Act deprives the defendant and appellant retailer of liberty and property without due process of law, and denies to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

I.

1. The basic statute—its analysis—gist of plaintiff's cause of action.

A. The nature, purposes and reasons for the enactment and legislative history of the statute is found in the attempt to destroy alleged predatory price cutting.

The legislative history of the Illinois "Fair Trade Act" taken from No. 23—Final Legislative Synopsis & Digest of the 59th General Assembly of Illinois, is as follows:

> "Senate Bill 598 (Searcy)
>
> Provides that certain contracts regulating resale prices of certain commodities which bear a trade mark, brand or name of the owner, named thereon, shall be valid and binding on the contracting parties. Any sale, offer of sale, or advertisement of sale, at less than such contract price is unfair competition

and actionable at the suit of any person damaged thereby. Act to be known as 'Fair Trade Act'.

1935—June 4. Introduced. 1st Reading. Without Reference.
June 5. 2nd Reading.
June 11. 3rd Reading. Further consideration postponed.
June 12. Passed.
June 12. House.
June 17. 1st Reading—Committee on Judiciary.
June 21. Committee discharged. Placed on Calendar.
June 26. 2nd Reading.
June 28. 3rd Reading. Passed.
July 8. Approved."

The Act became a law within less than a month of the date of its introduction in the Senate as a bill, and without any legislative hearings upon the bill. There is no legislative finding in the staute, and it does not appear that the legislature made any official investigation into any of the conditions, which are claimed to have given rise to the legislation.

In *Nebbia* v. *N. Y.*, 291 U. S. 502 (1934), wherein the price fixing features of the New York milk control law were held constitutional by this court, it was noted that thirteen public hearings had been held before the passage of the law, resulting in a report covering "463 closely printed pages." This court said at p. 516:

> "The conscientious effort and thoroughness exhibited by the report lend weight to the committee's conclusions."

This Act legalizing, as it purports to do, the making of resale price agreements, and revolutionizing the prior

public policy and the common law as it existed in this state, and as it now exists in the field of Federal law, is deserving of inquiry as to its historical origin and background. The "Fair Trade Act" is the result of an effort to hasten by legislation the day when developments in the field of unfair competition must no longer await gradual mutations in the judicial concept of fair trade. Within the last few years, there has been steady development toward that end.

The model of the "Fair Trade Act" is found in the oft-proposed Capper-Kelly "Fair Trade Act," (S. 97, 72nd Cong. 1st Sess.; H. R. 11, 72nd Cong. 1st Sess.) wherein it was proposed that contracts providing that a vendee is not to sell at lower than stipulated prices and is to exact a similar agreement from sub-vendees, would be valid. The proposed act, as does the Illinois law, applies only to trade-marked or branded commodities in fair and open competition with similar goods, and forbids discrimination between dealers of the same class. This latter provision is noticeably absent from the Illinois law. Resale below the stipulated price in closing out a line of goods, disposing of damaged or deteriorated articles, and in liquidation by an officer acting under the orders of a court, provided that the original vendor refused to repurchase the goods are likewise therein contained.

The bill was enacted by the House, but the Senate Committee on Interstate Commerce reported it without recommendation and it was lost. (76 Cong. Rec. 843-44, 948, 952 (1932).)

A similar law was recently passed in New York and some other eight states, as well as Illinois.

The Statute.

The Act is entitled as follows: "An Act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade-mark, brand or name." It was approved July 8, 1935.

8. "UNFAIR COMPETITION. Trade Mark—Provisions against resale—Validity of contract. Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity; provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

9. WHAT CONSTITUTES UNFAIR COMPETITION—Action.

§ 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 10.—Application of Statute. (3) This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Sec. 11.—Short Title. (4) This Act may be known and cited as the 'Fair Trade Act'."

(a) The economic point of view.

From an economic point of view, the Illinois Fair Trade Act represents a reversal in theory as to the most adequate means of protecting the public.

The Illinois Fair Trade Act, says Justice Wilson, speaking for the Illinois Supreme Court in *Triner Corp.* v. *McNeil,* 363 Ill. 559, at 569, was enacted in order to extinguish the practice of retailers in using "loss leaders". It refers to the practice whereby the retailer advertises a leading article, the regular price of which is well known, for special sale at extremely low figures—usually, a losing one to him—thus inveigling customers to his store and at the same time instilling in them the belief that the remainder of his articles, which are not so well known, bear the same advantages as to price and quality.

The theory of this court, and that of the Supreme Court of Illinois, that competition unrestrained was the public's surest protection of fair prices and good quality has been in part departed from by the Act in question. Where

formerly it was held that restriction of prices tended toward monopoly, with the ultimate result that the public was forced to accept goods at a dictated price, under the Illinois Fair Trade Act, competition is curtailed between retailers as to the sale price on the article of a single brand. The swing away from the original theory is not complete, in that competition between the different brands of commodities is retained.

One school of economists assert that "cut throat competition" leads to monopoly, as well as the control of prices. The survivor of the ruthless battle finds himself in a position to fix a price at will. It is claimed the public is injured through "loss leaders" because their use leads to higher prices generally and to the sale of goods of inferior quality. The loss is offset, it is said, through increasing prices on other articles as much in demand by the public.

The Illinois Supreme Court in upholding the statute says that the statute is not a price-fixing statute, in adopting the California case concept expressed in *Max Factor & Co.* v. *Kunsman,* 55 Pac. (2d) 177, and goes on to state "that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products." (363 Ill. 559, 568.) The purpose of the statute, its necessary effect and the reasons for its enactment were to prevent prices from being fixed by the usual forces of the market, and by "the ordinary play of fair and honest competition between manufacturers of similar products." The plaintiff in this action seeks just one thing, namely, to compel the defendant to sell its own property at a price fixed by the plaintiff in a contract wholly between it and a stranger, and to prevent the defendant from selling its own goods at a price fixed by "the ordinary

play of fair and honest competition between manufacturers of similar products."

Again the Supreme Court of Illinois (363 Ill. 559, 582) asserts: "No question of governmental price-fixing is, in consequence, involved." This is true, but the statute is nevertheless a price-fixing statute; for the Government has attempted to delegate to private persons the power to fix the selling price of practically every ordinary commodity sold by every ordinary business. In fact, the present statute is worse than one under which governmental agencies would fix prices. We might at least hope that Government officials whose acts are hedged with protective restrictions and restraints of official duty, and whose decrees are subject to judicial review, would be less arbitrary than would the private persons in whom this statute vests unrestricted and unreviewable power over the property of others.

Mr. Henry Ford, in a brochure of the Chemical Foundation, Inc., entitled The Only Real Security, No. 7, *American* Political Economy, states the objection from that standpoint in a nutshell:

> "The financers and the Government have still another point in common. Production with them is a secondary thing and not the main thing. Therefore, when they get into management, they always start to talk about the evils of competition and try to devise ways and means to limit competition. It is something that either is or is not. Barring competition is only a way of bringing in price fixing, and price fixing is not only the refuge of the incapable man but also a stone wall across the path of progress. Of course, much that goes on under the name of competition is not competition but racketeering. The competition of quality and service is the only thought worthy of the name."

Price fixing is the antithesis of competition, fair or otherwise.

The statute is not confined to predatory price cutting or the abolition of "Loss Leaders", for it permits producers to foist even exhorbitant price standards upon retailers to the detriment of the public. The statute has no "penal teeth", for no provisions are made for its uniform enforcement; but producers at their pleasure are permitted to obtain relief against whatever violators they see fit. Non-contracting parties, bound by contracts to which they are not parties, must at their peril select which contract they will be bound by and abide, for the statute says they are to obey "any contract".

(b) The Gist of Plaintiff's Alleged Cause of Action.

Stripped of all technicalities, the case comes down to this: A man owns a book, a barrel of flour, a sack of coal, a jar of cold cream or any other article. The article has been lawfully purchased for $1.00. The article bears the producer's name or brand. The brand may have been in use only a week or only a day. It may not even be entitled to protection under the Trade-mark Law. The owner of the article has made no contract with anyone affecting the resale price of the article. He has induced no breach of contract. He has been guilty of no fraud. He seeks to sell the article at a price of his own choosing, say, $1.98. He has a customer who needs the article and wishes to buy at that price. The manufacturer and competing retailer then step in and say to the owner of the article: "We have made a contract, not with you but between ourselves, that such articles bearing the manufacturer's brand or name shall not be sold below $2.50 or whatever other price the manufacturer chooses to stipu-

late in a contract to which you are not a party. Although you own the article, the legislature has given to us the power to fix, in our discretion, the price below which you may not sell your own property. It makes no difference that you lawfully own the property. It makes no difference that you paid the full price exacted by the producer who fixed that price for the branded article; or that after the purchase you had all the risks of ownership, resale, deterioration, theft, fire, storage, etc., and that neither the producer nor the competitor assumed any of these. It makes no difference that you can sell it at 98 per cent profit and that price is all that your customer can afford to pay. If you sell for less than $2.50, or for even one cent less than any other price which the manufacturer chooses to stipulate in a contract to which you are not a party, you will be mulcted in damages or enjoined because the legislature has given to us the entire judicial and executive power of the state to enforce our will over that property which you bought. Our reason for fixing the price at $2.50 is none of your business. Likewise, our reason for proceeding against you and not proceeding against some other retailer is none of your business. You will sell the property for which you paid the full price for at least $2.50 or you will not sell at all."

This is what the statute does and was intended to do, notwithstanding attempts to put it in a more flattering light, and to describe it in more unrealistic terms.

What the statute actually does, we submit, is the vital thing to bear in mind in determining the question presented. Basic constitutional rights of liberty and property are realistic and substantial. They are not to be whittled away by metaphysical refinements or specious analogies.

By the nature of the decree herein, and the opinion of the Supreme Court of Illinois, 363 Ill. 610, it is apparent that we are concerned only with the constitutionality of the second section of the "Fair Trade Act", and the matter of any contractual relationship between the parties hereto is not before this Court. The decretal part granting the issuance of the injunction provides that the defendant be forever enjoined and restrained by the Court from wilfuly and knowingly advertising, offering for sale or selling any of the plaintiff's branded merchandise known as Seagram's Products in the State of Illinois, "at less than the prices stipulated by Seagram-Distillers Corporation, a corporation, plaintiff herein, from time to time under the 'Fair Trade Act' of the State of Illinois, in accordance with the terms and provisions of contracts made pursuant to said 'Fair Trade Act' between plaintiff and its Distributors or between plaintiff and Retailers, which contracts, at the time of filing of the complaint herein were, or now are or may hereafter be in force in Illinois relating to the sale or resale of any said beverages in the State of Illinois." (R. .....)

The Supreme Court of Illinois, 363 Ill. 610, 614, said:

> "We are not concerned with the claim that the contract between plaintiff and defendant * * * is invalid * * *. Section 2 of the Fair Trade Act applies to wilfully and knowingly advertising, offering for sale or selling any commodity at less than the prices stipulated in any contract entered into pursuant to the provisions of section 1 of the act whether the person so doing is or is not a party to such contract."

We have here by the mandatory injunction of the Court a specific performance of the second provision of the "Act" relating to resale prices. The defendants are not enjoined from breaching any alleged contract with the plaintiff; they are enjoined from selling their mer-

chandise at prices other than those stipulated in the contracts between plaintiff and others, to which the defendants are strangers. The provisions of the decree for, and the decision of the Illinois Supreme Court clearly show that it is under and pursuant to the second section of the "Fair Trade Act" that the defendants are bound.

Analysis of the Statute.

The first section of the "Fair Trade Act" legalizes price maintenance contracts and relates to resale agreements, while the second section of the "Act" relates to resale prices. The decree herein indicates that the Court desired to and did enforce obedience to the resale prices fixed by the plaintiff and others, by requiring the defendants to sell the merchandise for not less than these fixed resale prices. There is no provision in the decree binding them to comply with the provisions of any alleged agreement relating to resale prices had with the plaintiff.

The language of the "Fair Trade Act" authorizes a vendor to stipulate that the immediate vendee shall not resell the article under contract except at the stipulated price. A liberal reading of subsection 1 of section 1 of the "Fair Trade Act" shows that the legislative intent probably was to restrict this provision to prices set by the producer, whereas a literal reading of the section would permit the stipulation for resale prices to be made by the vendor whether he be producer, wholesaler, or jobber. The producer usually determines prices for wholesalers and retailers, but if he only sets the wholesale price and the wholesaler is not bound by a resale agreement, then these wholesalers may, under the "Fair Trade Act," fix resale prices to subsequent vendees. We would thus have a number of conflicting retailer's prices.

Subsection 2 of section 1 provides for the binding of vendees other than immediate purchasers by the provisions of the agreement to maintain designated prices, the said subsequent vendees not being in contractual relationship with any of the parties to the resale agreement. The immediate vendee of the producer may have included in the contract that all others of the same marketing status will be bound by similar resale agreements. The "Fair Trade Act" allows this privilege of exacting agreements concerning resale contracts only to the "producer or vendee," and other persons are not covered. The owner of a trade-mark may not produce the commodities himself. They may be purchased from a producer. Injury to the trade-mark will, therefore, affect the owner rather than the actual producer.

To protect his trade-mark, the owner could require resale agreements from his vendees. They could refuse to enter into the resale agreements and they could not compel him to agree not to sell to other dealers unless resale promises were likewise exacted. From a reading of the "Fair Trade Act," it is apparent that the legislature has covered only the situation in which the owner of the trade-mark and producer are one and the same. There is an ambiguity in section 1 by the confusing use of the words "buyer", "vendee", and "purchaser".

In order to avoid all these complications, the testimony in this case having shown that the plaintiff had entered into resale agreements with others both distributors and retailers fixing resale prices, the defendants and all other retailers would be bound under subsection 2 of section 1 of the "Fair Trade Act" without their being in direct contractual relationship with the plaintiff. All the troublesome questions as to the right of the plaintiff to initiate resale price fixing agreements are

avoided, as are also the complications hereinbefore next immediately described.

The Illinois "Fair Trade Act" does not expressly repeal that portion of the existing Anti-Trust Act, to-wit: C. 38, Secs. 598, 602, Ill. Revised Statutes, 1935, which makes the entering into agreements to regulate or fix the prices of articles a criminal conspiracy, and declares any contracts attempting to accomplish this purpose invalid. There is nothing in the "Fair Trade Act" to indicate that the Anti-Trust Act is expressly repealed. Such repeal can only be had by implication from the "Fair Trade Act."

C. Constitutional Aspect of the Statute.

In considering the constitutionality of the statute we call attention to the following facts:

1. The statute is a private price-fixing bill. A manufacturer (or any "vendor" who may or may not be the manufacturer) is given the power to fix the price at which another person may sell his own property.

2. This power to fix the selling price of another's property is given to the manufacturer irrespective of any consent or agreement thereto by the owner of the property.

3. The power may be exerted over any article of commerce, provided only that it bears a brand or trademark, or even the manufacturer's name.

4. The price may be fixed in the absolute and uncontrolled discretion of the manufacturer for any reason or for no reason. It may be fixed high or low or anywhere in between. It may be fixed capriciously, arbitrarily or unwisely. It may be fixed because of mistake, ignorance or malice. It may be imposed or with-

drawn as the manufacturer, in his uncontrolled discretion, chooses. It may be changed when a manufacturer wills and as he wills. There are no standards or limitations prescribed by the statute. Once a manufacturer fixes a price, his will has the force of law if he, or some competing retailer, chooses so to regard it.

5. Prices are not fixed by the legislature or by an impartial state officer or body after due notice and hearing, but by private persons. No public body supervises the prices fixed. Neither the owner of the property nor the consumer (the persons most affected by price-fixing) is given any opportunity to be heard, much less any voice in fixing the price. No body, either judicial or administrative, can review the price fixed by the manufacturer.

6. Not only are private persons given the power to fix the prices at which another person may sell his own property, but private persons are likewise given unlimited and absolute discretion as to the enforcing of the fixed price. Failure to observe the fixed price is not made a crime, nor is the fixed price enforced by any state body or officer. The manufacturer or a single retailer (who, as in this case, may be in competition with the defendant) may proceed or not proceed against such retailer as he chooses. He may act for any reason or for no reason, capriciously, maliciously or unwisely and he may favor one retailer over another. By proceeding against a certain retailer and not another, he may drive the former from business and favor the latter. The act gives to private individuals the power of economic life and death over retailers.

7. There is no requirement that a uniform price be fixed. A manufacturer may enter into innumerable contracts each fixing a different price with respect to the

same sort of article. The statute, nevertheless, gives to private individuals the power to compel retailers who never signed any contract to observe the price fixed in "any contract".

8. The statute purports to give price-fixing powers to manufacturers whose products are "in fair and open competition" with commodities of the same general class produced by others; but it prescribes no standard or guide and no means for determining when a product is in fair and open competition with commodities of the same general class. A retailer who purchases a given article, and is not a party to any price-fixing contract, must determine at his peril and with no prescribed means of ascertainment whether he is free to sell the article at a price of his own determination, or whether he is bound by a price fixed by another.

9. There is no requirement that the contract be in writing; or that the price be filed in any public or other place. A manufacturer or a competitor need merely say that a particular price has been fixed, and the retailer who may have a large stock of the article on hand must determine the truth as best he can, without any adequate means of verification, and then proceed to sell or not to sell at his peril.

10. The statute is not a prohibition upon sales below cost. The statute prescribes sales of one's own property below a price fixed by another, and it is wholly immaterial that the person seeking to sell his own property seeks to sell it above cost, at a handsome profit to himself, with every economic justification and for the only price that his customer can afford to pay.

11. The statute is not a prohibition of price cutting with an intent to injure or destroy a competitor. Selling

one's own property below the price fixed by another is prohibited, even though the owner acts with the best possible motives and is seeking only to conduct his business and meet competition in a way that has always heretofore been regarded as fair and honorable, and which has in fact been required by our anti-trust laws.

12. The statute is not confined to the protection of the good will attaching to an established trade-mark, brand or name. A producer of unbranded goods may overnight acquire unlimited price-fixing powers merely by putting a name or brand on his product, and this power will extend over his products after he has parted with title thereto, and they have come into the hands of owners who never signed any price-fixing contract. It is not necessary that the brand or name should previously have enjoyed any good will or that it will hereafter enjoy any good will.

It may be one of ten thousand brands of canned fruit or vegetables on which not one cent of advertising has been spent, and as to which there is in fact no more identification in the public mind than there is in the unbranded article.

13. The statute is not confined to any paramount industry which, for special economic reasons, requires special regulation. Under the statute the price of every ordinary article sold by every ordinary business may be fixed.

14. The statute permits private persons to fix retail prices regardless of the locality in which the retail sales take place. A merchant in Farmer City, Illinois, may be compelled to observe the price fixed by a contract between other persons in Peoria, and a merchant in Metropolis, Illinois, may be compelled to sell at a price fixed by a contract between other persons in Chicago.

15. Private persons are given the power to fix the price at which a retailer must sell, regardless of the services and facilities which he furnishes to his customers. No matter how efficiently a retailer may operate, he is to be prevented from passing on to his customers the advantages of his efficient operation. Although a retailer furnishes fewer services and facilities than his competitors, under this statute he is obliged to charge the same price as his competitors, although his customers do not desire and perhaps cannot afford to pay for elaborate services and facilities.

16. The statute is not, and does not purport to be, an emergency measure.

17. The phrase "articles of standard quality" in the title of the statute is vague, indefinite and uncertain. The title of the "Fair Trade Act" states the legislative purpose is to control the distribution of "articles of standard quality under a trade-mark, brand or name." The text of the act omits the qualifying words "standard quality". The Act, to accomplish its purpose, must effectuate the phrase contained in the title. The statute is productive of great hardship because the commodities, whose prices are fixed, may fluctuate in quality. The prices would fluctuate concomitantly with similar fluctuations in quality. Different contracts fixing the prices would be successively consummated. Where prices increased by reason of improvements in quality, the retailer would be compelled to ask higher prices for inferior products manufactured prior to the improvement in quality. The legislature anticipated this contingency by permitting in the title, price fixing only in the matter of "articles of standard quality." This important element of the statute is disregarded in its body.

Standard quality is not defined by the law. Whether its determination shall be left to the producer, distributor, owner, vendor, vendee or the public, so that its price may be fixed, is left to conjecture and speculation.

The statute is silent as to the time the standard is to be determined, whether at the time of the effectiveness of the statute, the entry into a contract of sale, or the time of sale.

If new contracts are entered into upon improvements in quality, the inferior articles on hand will have to be marked up to and sold at the increased price. The retailer is at the mercy of the dictates of the producer in these contingencies.

18. The "Fair Trade Act" furnishes no guide or test to determine when an article is in "fair and open competition" or when there are commodities "of the general class."

19. The retailer is enjoined from advertising, offering for sale or selling "any commodity at less than the price stipulated in any contract entered into pursuant to Section 1 of this act whether the person so advertising, offering for sale or selling is or is not a party to such contract." The commodity is not limited to the one covered by the contract.

20. The statute is carelessly drawn and is so replete with vagueness, indefiniteness and uncertainty that no person, including (defendant) appellant, can possibly hope to arrive at a clear and intelligent understanding as to what duties have been imposed upon him by the statute. The law is not definite and certain enough to enable every person by reading the law, to know what his rights and obligations are and how the law will operate when put into execution. It denies due process of law. (*Champlin*

Refining Co. v. *Comm.*, 286 U. S. 210.) There is a total lack of reasonable standards in the statute, *i. e.*, no method of fixing prices, no requirement that they be uniform, no requirement that non-assenting parties follow any particular contract; no standard adjustable to particular conditions in given localities.

(1) Constitutionality.

Historical Background:

Producers, on their own initiative, sought to establish a resale price maintenance system for the sale of their commodities with which all vendors should comply, by the use of interlocking contracts long before the passage of legislation similar to that challenged here.

This Court in *Dr. Miles Medical Co.* v. *Park*, 220 U. S. 373 (1911) held such a system bad at common law because:

(1) It places a restraint on the alienation of the articles, and

(2) The producer having sold his products at prices satisfactory to himself, the public was entitled to whatever advantages could be derived from competition in the subsequent traffic, and

(3) The attempt to fix prices on future sales violated the provisions against restraint of trade and monopoly in the anti-trust law. (Act of July 2, 1890, C. 647, 26 Stat. at L. 209, 15 U. S. C., Par. 1.)

Neither the patent or copyright laws give the right to fix resale prices, and contracts making such attempts were held violative of the general law making the same void.

Patent cases:

Boston Store v. *American Graphophone Co.*, 246 U. S. 8.

Victor Talking Machine Co. v. *Kennedy*, 271 Fed. 810 (C. C. A. (3d) 1921).

Copyright case:

Bobbs Merrill Co. v. *Straus*, 210 U. S. 339.

The Illinois legislature and the Supreme Court now declare such contracts valid. The barrier of the common law rule and the state anti-trust law is removed.

(2) The constitutionality of the statute is not established by the opinion of certain economists that price-fixing is socially desirable, or by the legislative opinion that it is socially desirable.

The dominant theme of the argument for the validity of the statute is that the legislature can adopt whatever policy it desires for social improvement, if that policy has some respectable economic opinion behind it.

The argument obscures the real question before the Court, which is not one of economic or social theory, but one of constitutional limitation upon legislative power.

The opinions of economists were mustered in support of the National Industrial Recovery Act, and were adopted by Congress, but the Act was held unconstitutional by this Court in *Schecter* v. *United States*, 295 U. S. 495, 79 L. Ed. 888. Mr. Chief Justice Hughes, speaking for the unanimous Court, said (p. 905):

"It is not the province of the Court to consider the economic advantages or disadvantages of such a

centralized system. It is sufficient to say that the Federal Constitution does not provide for it."

Similarly, economic opinion was called upon to support the Railroad Pension Law; yet the Supreme Court, in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330, held the act unconstitutional as transcending the constitutional powers of Congress. Mr. Justice Roberts, in delivering the opinion of the Court, said:

> "Even should we consider the act unwise and prejudicial to both public and private interests, if it be fairly within delegated power, our obligation is to sustain it. On the other hand, though we should think the measure embodies a valuable social plan and be in entire sympathy with its purpose and intended results; if its provisions go beyond the boundaries of constitutional power we must so declare."

We have no doubt that economists' opinions could be gathered in support of the legislation that was condemned in each of the numerous cases in this Court. We have no doubt the opinions of economists, political writers, sociologists, etc., could be quoted in great number to support a statute completely abolishing private property. The abolition of private property may or may not be socially desirable. But one thing is certain: So long as we have a constitution which prohibits the deprivation of life, liberty or property without due process of law, such a statute is unconstitutional, no matter how many economists proclaim it socially desirable.

The arguments advanced might be appropriate before a constitutional convention considering a change of our fundamental institutions. These arguments are wholly irrevelant to a consideration of the question before this Court, which is, has the legislature, under our existing constitution, power to permit a private person, in his sole

and unfettered discretion, to dictate the price at which another person must sell ordinary commodities which he owns?

Whatever economists may envisage as an Utopian social order, under our system of constitutional government, the legislature cannot give to private individuals this unlimited power over the lives and property of other people.

II.

The two sections of the "Fair Trade Act" are interdependent and part of one legislative system designed to accomplish one object, i. e., the elimination of price cutting. If either subsection is unconstitutional, the whole act fails.

The Illinois "Fair Trade Act" does not contain a severable clause. The purpose of the "Act" is to prevent and eradicate alleged predatory price cutting. This is the sole purpose of the legislative enactment.

In the case of *Carter* v. *Carter Coal Co.*, Vol. 80, No. 15, pages 749-788, United States Supreme Court (Law. Ed.), Advance Opinions, this Court held the Bituminous Coal Conservation Act invalid. It here said, even though the act, unlike the Illinois statute, contained a severability clause, that in the absence of a legislative declaration that the invalidity of a portion of a statute shall not affect the remainder, the presumption is that the legislature intended the act to be effective as an entirety, so that if any provision is unconstitutional, the remaining provisions fall with it. This Court said:

> "The price fixing provisions of the code are thus disposed of without coming to the question of their constitutionality; but neither this disposition of the

matter, nor anything we have said, is to be taken as indicating that the Court is of opinion that these provisions, if separately enacted, could be sustained."

In the case of *Winter* v. *Barrett*, 352 Ill. 441, it was held that if the purposes of an act are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them. As we have heretofore explained, the legislature sought to accomplish the elimination of predatory price cutting by permitting resale agreements in subsection 1 and resale price fixing in subsection 2 of section 1 of the "Act". Both sections are interdependent and neither standing alone is capable of effectuating the legislative will as expressed in the statute. The statute is designed to accomplish a single purpose. It provides an entire system for the eradication of the evil described in the title. If any one of its provisions are invalid, the whole statute is invalid, in other words, if one section is good and the other bad, both must fall together.

Plaintiff and the Supreme Court of Illinois takes the position that subsection 1 of the "Fair Trade Act," merely seeks to give value and restates the common law of Illinois as to contracts entered into pursuant to the section, by providing in subsection 2 of the Act a remedy against those who knowingly sell for less than the stipulated price. In this remedy, they say, lies the sole change which the statute has introduced. The intent of the legislation is

then made obvious in that it is not the enforcement of a mere price maintenance contract the statute alone seeks, but also compliance with these contracts by non-assenting third persons. Section 2 is the novel and important introduction.

Thus it is readily seen that subsections 1 and 2 of the Fair Trade Act stand together; they form one logical, coordinate whole. Subsection 2 fortifies and buttresses subsection 1; without it subsection 1 is stripped of its economic effectiveness. The two sections together yield the same result as the already sanctioned agency method, but with an assurance of narrower competition, greater cost, and hence higher prices to the consumer.

Mere knowledge of the contract on the part of the price cutter is not sufficient to warrant the granting of relief against him. *Garst* v. *Hall & Lyon & Co.*, 179 Mass. 588 (1901).

There is no clause in the "Fair Trade Act" to the effect that if any provision thereof is declared unconstitutional, it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect. It stands or falls as a whole.

In the absence of such a legislative declaration, the presumption is that the legislature intends an act to be effective as an entirety. This is well stated in *Riccio* v. *Hoboken*, 69 N. J. L. 649, 662, where the New Jersey Court of Errors and Appeals, in an opinion delivered by Judge Pitney (afterwards a Justice of this Court) after setting forth the rule as above, said:

> "In seeking the legislative intent, the presumption is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise

valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the Act substantially unaffected by the process."

III.

The Illinois "Fair Trade Act" deprives retailers of liberty and property without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution.

A. Constitutional Principles.

(a) "* * * nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Fourteenth Amendment, Constitution of the United States.

(b) The right to buy, sell, barter and exchange property and to fix the price at which one's own property shall be sold is an inherent right of the property itself and subject to the due process clause of the Federal Constitution.

"The right of the owner to fix the price at which his property shall be sold or used is an inherent attribute of the property itself. * * * (citing cases) and as such, is within the protection of the Fifth and Fourteenth Amendments." (*Tyson* v. *Banton*, 273 U. S. 418, 429.)

"Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property * * * (citing cases). Property consists of the free use, enjoyment and disposal without control or diminution save by the law of the land." (*Buchanan* v. *Warley*, 245 U. S. 60, 74.)

Likewise, a person's "business is a property right * * * and as such is entitled to protection against state legisla-

tion in contravention of the Federal Constitution." (*Liggett Co.* v. *Baldridge*, 278 U. S. 105, 111.)

(c) The "liberty" protected by the due process clause embraces more than freedom from physical restraint. It includes freedom to contract and to pursue a lawful calling.

> " 'The liberty mentioned in that Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.' " (*Allgeyer* v. *Louisiana*, 165 U. S. 578, 589.)

(d) The fundamental rights guaranteed by our organic law cannot be abridged or curtailed by legislative action unless there are "special circumstances" justifying such action. A general restraint affecting all businesses of a private nature is not justified.

In *Nebbia* v. *New York*, 291 U. S. 502, 503, this Court recognized that restrictions upon the private control of one's own business and of one's own property are the exception, rather than the rule, and speaking by Mr. Justice Roberts, said:

> "Under our form of government the use of property and the making of contracts are normally matters of private and not public concern. The general rule is that both shall be free from governmental interference."

In *New State Ice Co.* v. *Liebman* (285 U. S. 262, at 277), this Court said:

> "Here we are dealing with an ordinary business, not with a paramount industry, upon which the prosperity

> of the entire state in large measure depends. It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker or the tailor each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use * * * and this court has definitely said that the production or sale of food or clothing cannot be subject to legislative regulation on the basis of public use."

In *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 537, this Court, per Mr. Chief Justice Taft, said:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product, or his wages could be fixed by state regulation."

(e) Freedom from restraint in the use of one's property and of one's liberty being the general rule and restraint the exception, under what circumstances may the legislature curtail the freedom of the citizen and the free use of his property? The answer, as deduced from the cases hereinafter cited, is that under our system of constitutional government, restrictions upon the liberty and property of our citizens cannot be imposed by legislative enactment unless the enactment (a) is for the purpose of protecting the public health, morals, safety or welfare; (b) does not operate in an arbitrary, unreasonable or discriminatory manner; and (c) provides means which are appropriate to achieve the statutory purpose.

B. Since the effect and purpose of Section 2 of the statute is the fixing of prices on ordinary commodities sold by ordinary businesses, it is not within the scope of any constitutional power of the legislature.

There is not and cannot be any claim by the proponents of this statute that it was enacted for the purpose of protecting the public health, morals or safety. The plaintiffs and the Illinois Supreme Court do, however, seek to sustain the statute as an enactment to protect the public welfare. The statute cannot be so justified.

This statute is not confined to any specific industry upon which, for special reasons, the public welfare depends. It is a general price fixing grant to private interests.

The prices charged for ordinary commodities by persons engaged in ordinary businesses cannot be regulated under the guise of protecting the public welfare. Businesses "affected with a public interest," such as railroads, grain elevators, public utilities, banks, insurance companies and warehouses, may be subject to regulation in the prices charged for the commodities sold or the services rendered by them. In periods of economic stress and emergency, other businesses which are singled out as occupying a unique position in our economic system and the condition of which at such time of stress and emergency jeopardizes the general prosperity of the community, may be subject to regulation. For example, rents may be temporarily regulated during a housing shortage, and the prices of an essential commodity, such as milk, may be regulated when the milk industry, which is essential to the well being of the people and to the credit of the State, is threatened with extinction due to an economic emergency.

Here, the statute in question is not confined to businesses affected with a public interest or to paramount businesses which call for temporary regulation due to economic emer-

gency. The statute provides that no one may sell his own property regardless of its nature, if it bears a manufacturer's brand or name, except at a price fixed by someone else. Every business, whether it is major or minor, and regardless of its economic condition or importance, falls within the scope of this statute.

There is no legislative finding or even suggestion that all businesses are threatened with extinction because certain retailers sell at prices other than those fixed by manufacturers. The general prosperity of the community is not imperiled because a retailer sells a package of razor blades, a bag of flour, a book, a bottle of whiskey or any other ordinary commodity for less than the manufacturer's arbitrarily fixed price.

Time and again the Illinois courts and the Federal courts have held state statutes purporting to regulate the prices of commodities sold by ordinary businesses unconstitutional. Moreover, the very cases which have upheld statutes regulating prices under certain circumstances have emphasized the special circumstances in the particular industry calling for such regulation, and they have expressly stated that price regulation of ordinary commodities sold by ordinary businesses contravenes the constitutional guaranties of our citizens.

In the following cases, state statutes purporting to fix the selling price of ordinary commodities and services were held invalid as transcending the constitutional limitations on legislative power.

Wolff Packing Co. v. *Court of Industrial Relations,* 262 U. S. 522 (Wages).

Tyson v. *Banton,* 273 U. S. 418 (price of theater tickets).

Fairmont Creamery Co. v. *Minnesota,* 274 U. S. 1 (price of cream).

Ribnick v. *McBride*, 277 U. S. 350 (fees of an employment agency).

Williams v. *Standard Oil Co.*, 278 U. S. 235 (price of gasoline).

People v. *Gillson*, 109 N. Y. 389 (price of food).

People v. *Steele*, 231 Ill. 340 (price of theater tickets).

See also:

New State Ice Co. v. *Liebmann*, 285 U. S. 262, 277, *et seq.*

In *Ribnick* v. *McBride*, 48 Sup. Ct. Rep. 545, this Court held that a New Jersey statute, conferring on the commissioner of labor power to fix prices which an employment agent shall charge for its services, was unconstitutional as violating the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The constitutional principle that the Legislature is without authority to fix the selling price of ordinary commodities is well summarized by the court in this case, as follows:

> "Under the decisions of this court *it is no longer fairly* OPEN TO QUESTION THAT, AT *least in the absence of a grave emergency*, * * *, *the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power.*" (Italics ours.)

In *United Theatre Offices, Inc.*, v. *Banton*, 47 Sup. Ct. Rep. 426; 273 U. S. 418, this Court held a New York statute, forbidding the sale of any ticket at a price in excess of 50 cents more than that printed on the ticket was unconstitutional and void, for the reason that it likewise violated the Fourteenth Amendment.

In *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, 71 L. Ed. 893 (1927), this Court held a statute of Minnesota forbidding under penalty, creameries to purchase cream at

higher prices in one locality than in other localities after allowance for the difference in cost of transportation, unconstitutional, as impairing the private right of freedom of contract guaranteed by the Fourteenth Amendment to the Federal Constitution, although the high bidding tended toward monopoly, since the statute had no reasonable relation to such bidding, previously regarded as beneficial to the public.

Mr. Justice McReynolds, speaking at page 896, 7:

> "* * * The statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction.
>
> "As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequence. *Enforcement of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions.*
>
> "The real question comes to this: May the state, * * * inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse." (Italics ours.)

The statute involved in the Fairmont case was in many respects similar to the statute involved in the instant case.

There, as here, the statute sought to compel observance throughout the state of a unit price fixed by private contract in a single transaction. There, as here, the proponents of the statute sought to justify its constitutionality by asserting that it was necessary to preserve free and fair competition. It will be observed in this case that the price fixed as standard was the price fixed, not by any governmental agency, but by individuals. The case completely answers the strange argument that price fixing by the Government is invalid, but private price fixing is constitutional.

In each of the foregoing cases the constitutionality of the legislation in question was sought to be upheld under the guise of protecting the public welfare. In those cases, as in the case at bar, arguments as to the elasticity of police power were pressed upon the courts. The courts, however, with firm unanimity have refused to uphold statutes which in fact fix the selling price of ordinary commodities and services.

Public welfare does not require such a regulation of private business. Our courts have not been blind to the fact that the public welfare is best subserved by leaving our citizens free to manage their own private affairs and to use and dispose of their own property on their own terms.

In businesses affected with a public interest and in other paramount businesses in times of emergency, prices may be regulated, but not otherwise. The class of businesses subject to regulation may be expanded by special circumstances, but so long as principles of constitutional law are observed, the legislature, at least in the absence of grave emergency, cannot compel the butcher, the baker, and the candlestick maker, the artisan, the merchant and the manufacturer to sell his commodities or services in the ordinary course of his business at prescribed prices. Much less can the legislature delegate to private individuals the power

to fix the price at which another person may sell his own property.

Indeed, the very cases which have upheld legislative price regulation because of special circumstances or emergency threatening a particular industry, by their rationale and language clearly indicate that price regulation of all ordinary businesses cannot be justified upon any constitutional principles.

See:

People v. *Nebbia*, 262 N. Y. 259, 264, 265.
Nebbia v. *N. Y.*, 291 U. S. 502, 523, 526.
German Alliance Ins. Co. v. *Kansas*, 233 U. S. 389, 414.
Block v. *Hirsh*, 256 U. S. 135, 137.

In *People* v. *Nebbia*, 262 N. Y. 259, Chief Judge Pound, speaking for the Court, held that the legislature because of "special circumstances" in the milk industry, might fix minimum prices for milk, but he specifically stated (pp. 264, 265) that the power so to fix prices "may not be invoked when we are dealing with an ordinary business, essentially private in nature."

In the same case in this Court, Mr. Justice Roberts said (291 U. S. 502, 523):

> "Under our form of government the use of property and the making of contracts are normally matters of private and not public concern. The general rule is that both shall be free of governmental interference."

And at page 526:

> "It results that regulation valid for one sort of business or any given circumstance may be invalid in another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon relevant facts."

Similarly, in *Darweger* v. *Staats*, 267 N. Y. 290, Chief Justice Crane, in referring to the claim of counsel that the Nebbia case was "authority to sustain legislation fixing the price of any commodity—shoes, clothes, coal, hardware, or anything else that might strike the legislature's fancy, provided an emergency be declared," stated (p. 308):

> "To say that the Nebbia case is authority for the legislature to fix the prices of all commodities is not justified by the decision."

Both the New York Court of Appeals and this Court in upholding the constitutionality of a New York statute regulating the charges of grain elevators (a business clearly affected with a public interest) again emphasized the fact that price regulation was not applicable to business generally. Judge Andrews, speaking for the Court of Appeals, in *People* v. *Budd*, said (117 N. Y. 1, 27):

> "We have no hesitation in declaring that unless there are special conditions and circumstances which bring the business of elevating grain within principles which, by the common law and the practice of free governments, justify legislative control and regulation in the particular case, the statute of 1888 cannot be sustained. That no general power resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the prices of commodities or services, or interfere with freedom of contract, we cannot doubt. The merchant and manufacturer, the artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammeled by burdensome and restrictive regulations which, however common in rude and irregular times, are inconsistent with constitutional liberty."

Mr. Justice Blatchford, speaking for the Supreme Court of the United States, expressly approved of the foregoing statement by the New York Court of Appeals (see 143 U. S. 517, 532).

In *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, 414, the Court, in upholding the constitutionality of a state statute regulating insurance rates, said, per Mr. Justice McKenna (p. 414):

> "We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequently beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted."

In *Block* v. *Hirsh*, 256 U. S. 135, 137, in upholding emergency rent laws, Mr. Justice Holmes, speaking for the Supreme Court of the United States, emphasized the temporary character of such laws and said (p. 157):

> "The regulation is put and justified as a temporary measure. * * * A limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change."

To avoid the effect of the foregoing cases, it is asserted that the United States Supreme Court in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 405, and in *Boston Store* v. *American Graphophone Co.*, 203 U. S. 6, 26, has impliedly recognized the validity of a statute like that here involved. This was argued in the Illinois Supreme Court, and we assume the same position is maintained here.

In fact, this Court has never given the slightest sanction to a statute like this one. What the Court did say was that resale price maintenance contracts, invalid at common law and under the anti-trust statutes, might be legalized, *as between the parties to such contracts*, by statute. The Government might remove legal obstacles to parties signing such contracts as they please.

It is a far cry from this doctrine to the statute here involved, which provides that a man is bound by a contract which he never made and never had the option of reject-

ing; and that he is obliged, regardless of his consent, to sell his own goods at a price fixed by someone else.

In *Adams* v. *Tanner*, 244 U. S. 590, 594, 61 L. Ed. 1336, 1342, L. R. A. 1917F; 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973, the Court said:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about with proper regulations. But this is not enough to justify destruction of every right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business which does not offer peculiar opportunity for reprehensible practices; and as to every one of them, no doubt, some can be found, quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guarantees of the constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

Query: If buyers' prices may not be fixed by statute, how can sellers' prices be fixed?

In 3 Williston on Contracts, page 2907, Sec. 1649, Limitations on resale prices, the author says:

> "* * * the United States Supreme Court has in a series of decisions held such an attempt to maintain a resale price invalid at common law, and when affecting interstate commerce, in violation of the Sherman Act, whatever form the attempt takes, even though the goods affected by the attempt are manufactured by a secret process (*Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 31 L. R. A. 376, 55 L. Ed. 502) or are protected by copyright (*Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339) or patent laws (*Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490) of the United States.
>
> "The argument has been made that since the law protects patents, copyrights, and secret processes, con-

tracts controlling the resale price of articles thus protected should not be obnoxious to the law.

"But it has been well said in answer to their argument. It is the policy of the law to reward individual thought and research by protecting the enjoyment of their fruits. Thus the author (*Palmer* v. *DeWitt*, 47 N. Y. 532) the news gatherer, (*Dodge* v. *Const. Info. Co.*, 183 Mass. 62, 66, N. E. 204) and the owner of an unpatented invention (*Tabor* v. *Hoffman*, 118 N. Y. 30, 23 N. E. 12) are protected against the piratical use of their peculiar property. A similar protection is extended to the chemist who has discovered a secret formula. (*Harrison* v. *Glucose Sugar, etc. Co.*, 116 Fed. 304.)

"But it does not follow that because a secret process or formula will be protected against betrayal by those to whom it has been communicated in confidence under a contract for a restricted use, that a system of contracts for the control of all sales and subsales of the article when produced will be outside of the sales in restraint of trade, simply because it is the product of such secret formula."

The doctrine of the United States Supreme Court as regards Resale Price Maintenance is warranted.

In *Dr. Miles Medical Co.* v. *Park*, 220 U. S. 373 (1911) this Court held that resale price maintenance contracts are invalid at common law and where they affect interstate commerce are in violation of the Sherman Anti-Trust Act.

This is true even though the goods are manufactured by a secret process, or are protected by patent or copyright laws of the United States.

Bobbs-Merrill Co. v. *Straus*, 210 U. S. 339 (1908).

Bauer v. *O'Donnell*, 229 U. S. 1 (1913).

The basis of this Court's decision is:

1. Such contracts effect a restraint on alienation.
2. Such contracts tend toward monopoly.

3. Such contracts involve an unreasonable restraint of trade, both at common law and under the Sherman Anti-Trust Act of 1893.

This Court in holding resale price maintenance contracts to be in restraint of trade and invalid, has been chiefly concerned with the injury to the public—that arising from lack of competition itself or from unfair competition.

A system of resale price maintenance involves a restraint of trade, because, by such a system, the manufacturer restricts the sale of his articles to only those dealers who agree to resell at the standard prices he puts upon the articles. Then dealers who contract to maintain the resale prices are absolutely bound to sell at the prices set by the manufacturer, or else be involved in a breach of their agreement with him.

Such restraints are unreasonable because of the adverse effect on the public. The interest of the manufacturer in resale price maintenance should not be protected so fully that it will deprive the public of free competition, so as to injure it beyond the benefit it will bring the manufacturer.

The public is interested in low prices, quality goods, and efficient dealer service. Under a system of free competition, the public obtains low prices, good quality goods, and efficient service chiefly through dealer or retailer competition. Certain retailers, by reason of efficient management, are enabled to sell a good standard quality of goods at low prices, making a profit by reason of large distribution. They get the greater share of the patronage of the consuming public. Close observance to their customers' ever changing desires maintains their supremacy. They are the dependable barometer of the public wants and demands. The public is prejudiced by any system which should injuriously affect the efficient dealer or benefit the inefficient or high cost dealer. Any system which handicaps the efficient

dealer is not a fair system of competition. The efficient dealer is most successful under a fair system of competition.

Resale price maintenance handicaps the efficient dealer, and favors the high cost dealer. It is unfair competition. It deprives the efficient dealer of his most effective means of competition—low prices. The manufacturers, desiring large distribution, under the resale price system will fix a system of prices under which most dealers can make a profit. Naturally such prices would be above those of the efficient dealer, and tend towards those of the high cost dealer. The public is deprived of the benefit of competition among dealers and is compelled to pay prices based on an allowance of profit to high cost dealers.

The findings of the Federal Trade Commission against the Cudahy Packing Co., for maintaining resale prices on Old Dutch Cleanser, showed an allowance on the resale price so that in a majority of cases, from ten to thirteen per cent gross profit was made by dealers; a gross profit which the commission found was ample to support even the highest cost dealers handling Old Dutch Cleanser. (19 Col. L. Rev. 265.)

Under a resale price maintenance system, since the price set will be one which will tend to give a profit to the high cost dealer, and further, since price competition will be lessened, the public will pay higher prices for goods than under a system of free competition.

The rule against restraints on alienation makes void every provision or contract restrainng the alienation voluntary or involuntary, of an estate in fee simple or an absolute interest in chattels, real or personal, whether legal or equitable. The policy underlying the rule is that all property be freely transferable and marketable. Under the system of resale price maintenance the manufacturer

demands that the dealer shall not resell, shall not again transfer the article, unless he resells at the price set by the manufacturer.

A resale price maintenance system tends toward monopoly; the dealers tend to become the agents of the manufacturer. Newcomers cannot enter the field, since the retailers are lined up with the established manufacturers by contract.

The chief argument to sustain the validity of resale price contracts is that such a system is necessary to protect the good will and public favor which the manufacturer builds up by advertising and long established sound course of dealing, from predatory price cutting. Predatory price cutting is described generally, as the advertising and selling of identical goods at less than the fixed price, or at even less than cost, for the purpose of inducing the purchaser of identified goods to buy unidentified goods at a large profit to the seller.

Hence predatory price cutting entails some further action on the part of the dealers than the bare cutting of the prices on the goods themselves. Price cutting is practiced throughout the country by the most reputable merchants and requires no justification as a commercial practice, or as a means of competition.

The Illinois Fair Trade Act recognizes legality of price cutting in unidentified goods, and by its Anti-Trust Act encourages it.

If the goods of the manufacturer are a credit to the manufacturer the manufacturer should not fear price cutting, since it tends to bring about a larger distribution of his product. If they are not a credit to the manufacturer, he deserves not only to be injured, but to fail. It has been said that an article of merchandise, without a trade-mark,

is like a mule, without pride of ancestry or hope of posterity.

The only injury the manufacturer could seek to prevent by a resale price system then, is the type of a fake bargain sale where prices of standard identified goods are cut for the purpose of attracting customers to purchase other goods, on which prices are not cut, and on which a profit is expected to be made. This injury is too slight to justify resale price maintenance as a preventative. It is found to be only spasmodic since it is not profitable to the ordinary dealer, in comparison with the risk he runs of losing the right to deal with the goods of manufacturers of standard goods; and, in comparison with his risk of injury to his subsequent sales of standard articles, which, naturally, if of good quality, tend to form the greater share of his ordinary business.

To sum up:

Resale price maintenance is in restraint of trade, and unreasonably so because: (a) it throttles the efficient dealer in competition, by depriving him of his most effective means of competition, and handcuffing the efficient dealer, gives rise to unfair competition; (b) it injures the public as consumers similarly to the way it injures the efficient dealers. It deprives the public of low price competition and of the most certain barometer of public wants; (c) it makes it practically impossible for dealers to convert their goods into ready cash in case of financial embarrassment.

Such contracts are in restraint of alienation because they allow the manufacturer to curtail the subsequent commerce of his articles, after he has sold the goods to the dealers; a sale which passes title absolutely to the dealer.

The interest of the manufacturer against predatory price cutting is not of strong enough importance or weight to

warrant holding the contracts to be reasonable, since predatory price cutting is bound to be only spasmodic, and is subject to legitimate *checks* of the manufacturer and of the law where it involves fake bargain sales.

As Chief Justice Hughes says in the Dr. Miles case, 220 U. S. 373:

> "The manufacturer having sold his product at prices satisfactory to himself, the public is entitled to whatever advantage may be derived from the competition in the subsequent traffic."

We repeat, therefore, that the legislature has exceeded its constitutional power in enacting a statute which regulates the selling price of ordinary commodities and is applicable to all businesses.

IV.

Legislation identical with Section 2 of the Fair Trade Act has been held invalid by the court of last resort in New York and held valid by the court of last resort in California by a divided court, two judges filing dissenting opinions.

The freedom of contract of those not desiring to enter into re-sale price agreements is impaired by Section 2, of the "Fair Trade Act." It restricts the right to sell a product which he owns at the price he desires.

In *Doubleday, Doran & Co.* v. *R. H. Macy & Co.*, 269 N. Y. 272; 199 N. E. 409, the New York Court of Appeals held the New York Fair Trade Act, substantially in all respects the same as ours, unconstitutional.

The case related to the sale of books by Macy & Co. below prices stipulated in contracts between Doubleday, Doran & Co. and its vendee, and to which contracts Macy

& Co. were strangers. The complaint was dismissed in the lower court and on appeal the ruling was affirmed.

The Court in holding this section of the act unconstitutional and void, said:

> "That the states cannot fix the selling price of any and all commodities has been settled." (*Williams Co.* v. *Standard Oil Co.*, 278 U. S. 235; *Tyson & Bro.* v. *Banton*, 273 U. S. 522; *Straus* v. *Victor Talking Mach. Co.*, 243 U. S. 490.)
>
> Books, at least these books, are not 'affected with public interest' any more than theatre tickets; no emergency has yet arisen in literary publications, and the business is not such as comes within the classes which must submit to rate fixing.
>
> Circumstances which cannot be foreseen from one generation to another may arise which will require certain articles to submit to regulatory prices in order that the public may get them at all or get them in a pure and beneficial state. We cannot always express legislative power in exact formulas nor decide a case before it happens. Experience is the mother of teachers.
>
> Under the Nebbia case, for instance (291 U. S. 502), no one would doubt now that New York State would have the power to get milk to the public somehow if any combination of forces threatened to shut off all supply or to deteriorate that which was supplied. The price might be an element to be considered with other things in such a case. So we thought in 262 N. Y. 259.
>
> But to fix arbitrarily the price of books by legislation and not by agreement comes within the condemnation of the decisions which have heretofore dealt with like legislation.
>
> What the legislature cannot do directly it cannot do indirectly, nor does it cease to be a price fixed by the legislature because that body has clothed the publisher with the power or authority to establish it.
>
> For a publisher to agree with its subsidiary or agent to the price of a book which shall thereafter bind all other parties who purchase like books from the publisher is in reality a method whereby the legislature

> fixed the price; it is a species of delegated authority. The plaintiff * * *, the publisher, was not obliged to sell Macy & Co.; it could do so or not as it pleased, and it could refuse to sell because Macy was cutting the price. (*U. S.* v. *Colgate & Co.*, 250 U. S. 300.) * * *"

In the other, the Supreme Court of California divided four to two in favor of the validity of the similar statute of that state. The Illinois Supreme Court in the instant case adopted and followed the majority opinion in *Max Factor & Co.* v. *Kunsman*, 91 Cal. Dec. 345, 55 Pac. (2d) 177 (1936), the California case, and not the two dissenting opinions filed by the minority which chose to follow the New York decision in *Doubleday, Doran & Co.* v. *R. H. Macy & Co.*, 269 N. Y. 272; 199 N. E. 409 (1936).

The basis of the Illinois and California decisions is that the "Fair Trade Act" has a reasonable relation to a proper legislative purpose and is neither arbitrary or discriminatory.

The New York Court of Appeals in *Doubleday, Doran & Co.* v. *R. H. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409 bases its decision, as does the dissent in *Max Factor Co.* v. *Kunsman*, 91 Cal. Dec. 345, 55 Pac. (2d) 177, on the fact that production and sale of trade marked articles was not "a business affected with a public interest," which is a prerequisite to price fixing legislation.

The prime cleavage in the reasoning between the opposing views of the New York Court and the California dissent and the majority opinion in California and the Illinois decision relates to the constitutionality of price fixing legislation and its distinct history.

This Court first developed the doctrine that there was a separate category of business "affected with a public interest" in which prices might be regulated in *Munn* v. *Illi-*

nois, 94 U. S. 113. This Court there said that the owner, by devoting his business to the public use, in effect granted the public an interest in that use and subjected himself to public regulation. The finding of a public interest was a prerequisite before prices could be regulated by statute. This test was followed for fifty years without question.

In *Williams* v. *Standard Oil Co.*, 278 U. S. 235, this Court held that a business was not affected with a public interest merely because it was large, or because the public might have some feeling of concern in respect of its maintenance.

In *Tyson* v. *Banton*, 273 U. S. 418 (1927), this Court held the sale of theatre tickets was not affected with a public interest and statutory price regulations thereof was invalid. In the dissent by Mr. Justice Stone and the late Mr. Justice Holmes, the phrase "affected with a public interest" is for the first time declared vague and unsuitable as a test.

In *Ribnick* v. *McBride*, 277 U. S. 350 (1928), this Court by a six to three majority continued to use the old test, the dissent stating there was no controlling difference between reasonable price regulation and other forms of regulation curtailing liberty.

In 1929, *Williams* v. *Standard Oil Co.*, 278 U. S. 235, this Court followed the same test, the late Mr. Justice Holmes dissenting without opinion.

In 1934, by a five to four majority in *Nebbia* v. *New York*, 291 U. S. 502, this Court flatly denied the existence of separate business categories. The Court applied the same test as used in other fields relating to due process in the protection of one's personal liberty. The Court applied the test that the regulation must not be unreasonable, arbitrary or capricious and that the means must have a substantial

relation to the object sought to be attained. Mr. Justice Roberts, stated, however, that:

> "The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good."

The New York Court, which decided the Nebbia case, 291 U. S. 502, before its appeal to this Court, distinguished that case from *Doubleday, Doran & Co.* v. *R. H. Macy & Co.*, in holding the New York Fair Trade Act unconstitutional, stating the Nebbia case, 291 U. S. 502, could be distinguished on the facts. It followed the old test of *Williams* v. *Standard Oil Co.*, 278 U. S. 235, and the Tyson case (273 U. S. 418).

In California, the majority, and in Illinois the Courts accepted the language of the Nebbia case (291 U. S. 502).

The production and sale of trade-marked articles as a class is not *per se* a business "affected with a public interest" as required under the rule, if it still is the rule.

The California majority and Illinois Courts attempted to escape the problem by asserting that the main purpose of the Statute was to protect the good will of the producer, the contracts of the retailers and the welfare of the public; that its purpose was not to fix prices and therefore the statute was outside the price fixing field. (Wilson J., 363 Ill. 559, at 568.) This Court is not bound by characterizations of the subject matter of a statute by the State Supreme Court so far as they bear on its constitutional effect.

This argument is similar to the dissent of Mr. Justice Stone in *Tyson* v. *Banton*, 273 U. S. 418, where it is said that the price of the tickets was not being regulated, but rather the amount of profit the ticket "scalper" should be allowed to make.

The fact remains, in each case however, that a person is prevented from selling what he owns for such price at which he wishes to sell. This is the fundamental liberty which the cases of this Court were so careful to protect.

Under this rule the act is unconstitutional.

A. The Fair Trade Act of Illinois is also unconstitutional because:

(1) Discriminatory.

The manufacturer is not required to sell at the contract price even to the same class of wholesale or retail customer; he may be selling at cost and at the same time be suing, for damages or an injunction, a retailer who sells at less than contract price.

(2) Indefinite.

Where several contracts of varying retail prices exist there is no determination as to which one is the controlling price.

U. S. v. *Cohen Grocery Co.*, 255 U. S. 81, 89.

Connelly v. *General Construction Co.*, 269 U. S. 385, 390.

Cline v. *Frink Dairy Co.*, 274 U. S. 445, 453.

(3) The price fixed is left to the uncontrolled dictates of the producer.

Mr. Justice Thompson dissenting in *Max Factor & Co.* v. *Kunsman*, 91 Cal. Dec. 345, 55 Pac. (2d) 177 (1936), said:

> "A person may not be bound with respect to his property by the action, whim or caprice of another, particularly where the latter is not vested with any responsibility," citing *Washington* v. *Roberge*, 278 U. S. 116 and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

(4) The act covers too much territory.

As was said in *Tyson* v. *Banton*, 263 U. S. 418, it is not permissible to spread an all-inclusive net sure to entangle the innocent on the chance that some guilty party may be caught. The Illinois Fair Trade Act enmeshes honest merchants, who may be content with smaller profits and who, by reason of greater efficiency are able to sell at lower prices and still make profit. The act is not limited to the unscrupulous price cutter out to destroy his competitors.

The Illinois Court in its decision, 363 Ill. 559, relies upon two decisions by Vice-Chancellor Lane in *Ingersoll* v. *Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030, and 89 N. J. Eq. 322, 108 Atl. 128. The Ingersoll case was decided under a statute quite different from the statute here involved and upon facts very different from those shown in the present record. In the Ingersoll case, actual fraud on the part of the defendant was both averred and proved. Here, it is not alleged that the defendant is doing anything other than honestly selling its own property at a price less than that fixed by the plaintiff and strangers in the contract wholly between themselves.

The decisions in the Ingersoll case are by a single judge in a court of first instance. As authority the Ingersoll case, to put the matter conservatively, does not outrank the decision of the New York Court of Appeals. The Ingersoll case was never appealed, and the New Jersey Appellate courts have never passed upon the constitutionality of the statute here involved. In seventeen years the case has never been approved or cited by any New Jersey decision in so far as we have been able to discover.

Apparently neither the New Jersey legislature nor the sponsors of price-fixing legislation have heretofore thought that the statute upon which the Vice-Chancellor passed in the Ingersoll case permitted a manufacturer to dictate

resale prices, for by Chapter 58 of the Laws of 1935, the New Jersey legislature adopted a bill identical with the Illinois Fair Trade Act here challenged. Such a statute, of course, would have been unnecessary had the price-fixers been willing to rely upon the Ingersoll case or the statute considered in that case.

The cases of *Nebbia* v. *New York,* 291 U. S. 502, and *Munn* v. *Illinois,* 94 U. S. 113, also relied upon by the Illinois court in its decision, are not applicable because the statute does not vest price control in the hands of governmental agencies, nor is it concerned with emergency goods.

Note the Wisconsin Fair Trade Act (Sec. 133.25, as added by Chap. 52, Laws of 1935, effective May 2, 1935) similar in all provisions to the Illinois Fair Trade Act, but containing an additional section as follows:

> "7) (a) Upon complaint of any person that any contract containing the provisions referred to in Subsection (3) is unfair and unreasonable as to the minimum resale price therein stipulated, the department of agriculture and markets may in its discretion serve by registered mail upon the parties to said contract notice of the time and place for a hearing on said complaint, at which hearing said parties shall show cause why the said contract shall not be set aside. If upon such hearing the department of agriculture and markets shall find that such contract is unfair and unreasonable as to its minimum resale provisions, said department may by special order declare such contract to be in restraint of trade. * * *
>
> (c) Decisions in such cases shall be subject to judicial review as provided in Section 99.27."

Here at least is a semblance of an attempt to prevent the arbitrary dictates of the price fixer from determining what the public shall pay for the trade-marked or branded articles of merchandise, and a recognition of the unreasonable and discriminatory character of the act, in the absence of

any safeguard by way of governmental supervision over prices.

It is one thing for the law to allow a man voluntarily to fix the selling price of his own property. It is quite another for the law to compel a man to sell his property at a price fixed by somebody else. The Constitution may permit a man to fix the selling price of his own property. It does not compel a man to sell his own property at a price fixed by another.

V.

The statute is an unconstitutional delegation of legislative power to individuals, therefore denying to retailers the equal protection of the laws as well as due process of law.

That the legislature power may not be delegated, is a proposition so elemental, as to scarcely require the citation of authority for its support.

The suspension of a statute, *i. e.*, the state anti-trust laws, as to price maintenance contracts on trade-marked or branded goods, delegates the legislative powers to the individuals entering into such contracts. It is said by Cooley-Constitutional Limitations, 8th Ed., Vol. 1, pages 232-235, where abun ınt authority is cited:

> "The suspension of a statute is a legislative Act, unless based upon some contingency, condition, exigency, or state of facts, declared by the legislative enactment to be sufficient to warrant the suspension by an executive or administrative body, whose duty, it is to execute or administer the law suspended."

Here individuals suspend the anti-trust act of the state by entry into the price fixing contracts. Two or more retailers can not combine and fix a price on a commodity

but the producer through a contract with one or both can fix the price with impunity from the Anti-Trust Act of Illinois.

The individuals may elect to proceed under the "Fair Trade Act" and enter into contracts with impunity of enforcement of the anti-trust laws against them or not, as they may choose.

Under the Fair Trade Act, no official body is set up to fix prices. It is left to private individuals, producers, to determine, firstly, whether prices should be fixed and, secondly, at what level. No outsider, who may be ultimately bound by the determination, is permitted an opportunity to be heard on either question.

The retailer who is going to be restricted in the conduct of his own business by the conclusions reached, is not allowed to present his views as to the reasonableness of the price or indeed as to the necessity for fixing any price. The consumer who must bear the burden of the increased price, has no opportunity to be heard before the prices are fixed. No machinery is provided for judicial or administrative review of any of the acts of producers or retailers before fixing prices.

This is the same type of unconstitutional delegation of legislative power as brought about the setting aside of the National Industrial Recovery Act, and with it the Illinois State N. R. A. *Schechter Poultry Corp'n* v. *U. S.*, 295 U. S. 495.

In this case the Supreme Court held section three of the National Recovery Act to be an unconstitutional delegation of legislative power to the President in that it does not supply standards or prescribe rules of conduct

to be applied to particular states of fact determined by appropriate administrative procedure. The Court states:

> "Instead of prescribing rules of conduct, it (Section 3 of the Act) authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes and thus enacting laws for the government of trade and industry, throughout the country, is virtually unfettered. We think that the code making authority thus conferred is an unconstitutional delegation of legislative power."

It will be remembered that these codes prescribed prices at which commodities were required to be sold, the same as the contracts provided for by the Fair Trade Act. The Wisconsin "Fair Trade Act" which is in large part similar to the Illinois Act, attempts to meet these objections (Section 133.185, 133.25 to 133.27 Wis. Stats. 1935) by providing for complaints by consumers as to unfair and unreasonable prices to the Department of Agriculture and Markets, which body conducts hearings, upon notice, to determine the fairness and reasonableness of the price resale maintenance contracts, subject to judicial review of its findings declaring any of such contracts illegal or valid. Here is recognition of the fatal defects in the type of Fair Trade Act enacted in Illinois.

All the powers granted to the President in code making under the National Recovery Act, all the powers granted to the Department of Agriculture and Markets under the Wisconsin Law, under the provisions of the Illinois Act, are within the hands of the individual retailers, or producers to exercise at their whim and fancy.

No clearer exercise of the legislative powers by individuals can be well imagined.

The Fair Trade Act, even though it were enacted for a valid and constitutional purpose, as applied to this defendant, cannot be upheld because, in its operation, it is arbitrary, discriminatory, and the means adopted to accomplish the legislative purpose are not appropriate to that end. This principle was recognized in *Nebbia* v. *N. Y.*, 291 U. S. 502. "* * * If the laws passed are seen to have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory the requirements of due process are satisfied. * * * Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. * * *" Further statement of this same principle may be found in numerous other cases in the United States Supreme Court. (*Nectow* v. *Cambridge*, 277 U. S. 72; *Adams* v. *Tanner*, 244 U. S. 590; *Burns Baking Co.* v. *Bryan*, 264 U. S. 594; *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402.)

This defect in the Illinois "Fair Trade Act" is the attempt to give to private persons unlimited power over the property of others Unless the courts are prepared to hold that by placing his brand upon a commodity, the producer retains a property right in that commodity until it reaches the hands of the consumer, so that he may fix its price at every stage of distribution, this statute must fall. That it is unconstitutional to place such power in the hands of private individuals seems to be plainly indicated by the authorities.

Thus in the case of *Baltimore* v. *Radecke & Co.*, 49 Md. 217 (Court of Appeals), an injunction was granted to

restrain the prosecution of an action to collect a penalty for each day's failure to remove a steam engine as a claimed nuisance. The plaintiff secured a permit to install the engine on his premises, under and pursuant to an Ordinance, which contained a clause that the engine was "to be removed after six months' notice to that effect from the Mayor. In affirming the decree granting the injunction the court said:

> "But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the city of Baltimore to cease to do so, and by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the Ordinance to guide or control his action. It lays down no *rules* by which its *impartial execution* can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others from whom they are withheld may be actually benefited by what is thus done to their neighbors, and when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to everyone who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power, hardly falls within the *domain of law*, and we are constrained to pronounce it inoperative and void."

In *Yick Wo* v. *Hopkins,* 118 U. S. 356, in an opinion in connection with a decision reversing the Supreme Court of California, the Supreme Court of the United States said, in reference to an ordinance requiring a permit from the board of supervisors of San Francisco before operating a laundry in a building of other than brick or stone construction, and where the applicant had been operating his laundry for some twenty-two years, was refused a permit, and fined for violation of the ordinance:

> "But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

This question was the occasion of recent decisions in *Darweger* v. *Staats,* (267 N. Y. 290). There the legislature passed what was known as the State National Recovery Act. The statute, enacted as an emergency measure, provided that upon the filing in the office of the Secretary of State of New York a copy of any code approved by the President, such code should become effective for intrastate transactions in New York. As a result of the statute, a code authority within New York attempted to fix prices of coal in accordance with authority given in the code filed in Washington.

The court concluded that by this statute "the legislature of the State of New York has turned over to the National Administrator the question of determining whether there shall be price fixing in New York State of coal and what it shall be." The court on this ground declared the statute unconstitutional, that the legislature cannot leave to a National Administrator the declaration of the necessity for fixing prices in the state. Like views as to the unconstitutional delegation of legislative power under provisions of the federal constitution, similar to the provision of our state constitution, may be found in *Panama Refining Co.* v. *Ryan,* (293 U. S. 388) and *Schechter* v. *United States,* (295 U. S. 495, 79 Lawyers Ed. 888).

The Fair Trade Act is a broader delegation of power than was declared unconstitutional in *Darweger* v. *Staats,* (267 N. Y. 290). The delegation here is to private individuals, indeed, rather than to governmental authorities. The delegation has been without any standards or restrictions. As was stated by the court, "The legislature has left too many things to be determined by other bodies to make this law constitutional."

The plaintiff relies chiefly upon the Nebbia case (262 N. Y. 259; 291 U. S. 502). It is true that there is language in the Nebbia case which, ripped from the context of the opinion and divorced from the facts involved, might give some substance to the plaintiff's contention. The facts in that case, however, bear no resemblance to the present one.

In that case:

1. There were legislative findings of fact based upon a complete and thorough legislative investigation.

2. The enactment was effective only during the pre-

scribed period of a short emergency, which was declared by the legislature to exist.

3. The fixing of prices was related to one commodity only—milk.

4. The price of milk was to be fixed by a governmental agency after hearings, and was to be subject to judicial review by certiorari.

5. The legislative findings of fact upon which the statute was based were as follows: (a) that milk was an essential item of diet of all of the people of the state; (b) that the absence of proper safeguards of such product would lead to the spread of disease; (c) that proper and adequate safeguards were being threatened in the State of New York because of existing insufficient return of milk producers; (d) that the milk industry was a paramount industry of the state and that the maintenance of it was vital to the credit and economic structure of the state; (e) that the financial structure of the industry was in danger because of certain conditions and various enumerated factors of instability peculiar to the industry itself.

6. The statute was admittedly passed as a health measure under the recognized limitations of the police power.

7. Prosecution and enforcement were lodged with the state authorities.

Each of the above itemized facts present in the Nebbia case indicates a radical difference from the case at bar. A mere statement of the differences should suffice to indicate that the holding of the court in the one is in no way controlling upon the legal conclusions in the other.

It is true that in the Nebbia case this Court did not

require in terms that the commodity be "affected with a public interest." That ancient expression was defined anew in the opinion of the court (page 536) as a phrase which "can in the nature of things, mean no more than that in industry, for adequate reason, is subject to control for the public good." There is implicit in any definition of the phrase, however, the requirement that there be such relationship between the business and the public welfare, that governmental interference with the private property and rights involved will be justified in spite of the due process clauses.

It cannot be contended that the Nebbia case is authority for the proposition that the prices of ordinary commodities may, without more ado, be fixed by the legislature, much less by private individuals. The New York Court of Appeals pointed out in *Darweger* v. *Staats,* (267 N. Y. 290) that the Nebbia case was not such authority, even if an emergency were declared to exist, and even if the price-fixing power were limited to the period of the emergency. The court stated:

> "The briefs place much emphasis upon *Nebbia* v. *New York,* (291 U. S. 502), *People* v. *Nebbia,* (262 N. Y. 259), and claim that this is an authority to sustain legislation fixing the price of any commodity—shoes, clothes, coal, hardware or anything else that may strike the Legislature's fancy, provided an emergency may be declared. The fixing of the price of milk in the Nebbia case was a mere incident to other regulations which tried to meet an abuse growing up to the detriment of the farmer and his stock. This control of the output protected the very vitals of the industry, and it would not have been a far step to have held, as perhaps it was intimated, that the milk industry was one touched with a public interest, such as water, electricity, grain and the like. To say that the Nebbia case is an authority for the Legislature to fix the prices of all commodi-

ties is not justified by the decision. What the legislative power may be in a given case regarding any industry we do not undertake to say. Sufficient unto the day is the power thereof."

Although somewhat different phraseology was used by the courts sustaining legislation fixing the price of milk, still "it would not have been a far step to have held, as perhaps it was intimated, that the milk industry was one touched with a public interest, such as water, electricity, grain, and the like." *Darweger* v. *Staats,* (267 N. Y. 290).

Price fixing agreements in Illinois are against public policy, and the Supreme Court has stated that it believes the legislature meant to prohibit them, when it enacted the state anti-trust and anti-price fixing act. The "Fair Trade Act" gives an unjust privilege to the great manufacturers to obtain more profits. There is no distinction in the anti-trust act between price fixing agreements covering branded merchandise as opposed to bulk or unbranded merchandise. The Fair Trade Act providing for such distinction is sought to be justified by the Illinois Supreme Court on the ground that it provides for "vertical" rather than "horizontal" price fixing. The latter type of price fixing is admittedly invalid under our anti-trust act, *i. e.,* agreements by groups and producers, wholesalers or retailers to fix the sale or resale price of their collective products or commodities.

"Vertical price fixing," meaning thereby the efforts of a single producer to fix and maintain the prices of his products by those who sell the ultimate consumer, it is claimed is not. The appellant asserts that the contracts of the plaintiff, with its distributors, with the producers, Jos. Seagram & Son, Inc., and Joseph Seagram & Son,

Ltd., together with the contracts with the retailers, is a combination, agreement, etc., condemned by the Sherman Anti-trust Act.

While a law might be devised to favor "vertical price fixing," surely the Fair Trade Act does not legalize it. The defects in the act are so seemingly patent as to make it imperative that it be declared invalid. The act does not even provide that the producer shall enter into similar agreements with each retailer. One might be favored over another and seemingly the less favored one would have a cause of action against the more favored retailer though the latter would be living up to the letter of his contract with the producer. The Fair Trade Act commits legislative sabotage on the delicate mechanism of production that has already suffered too much from political experimentation.

It is class legislation and foreign to our constitutional policy, and against the tradition of our democratic institutions for the government of Illinois to be placed in the position of extending economic protection to any particular business group, whether manufacturers or distributors.

It is the most objectionable sort of class legislation. It is in the interest of the producer. It is no substantial benefit to the retailer. It lays a tremendous burden on the consumer. The law gives to the manufacturers of the country the privileges which the legislature refuses to its farmers—that of fixing the selling price of their products.

Under this Act, a manufacturer can affix a trade name to practically any article—to any object of commerce—to the necessities of life, to flour, medicines, meats, canned goods, cereals, crackers, to clothing of all sorts, to plumb-

ing and heating apparatus, to cement, gasoline and building materials—and may then declare the uniform price at which the article may be sold throughout the state. This it may do with no governmental or other agency to determine whether the article is of standard or inferior quality, whether it possesses merit or lacks merit, whether it is in open competition or controlled by a monopoly, whether the price is fair or exorbitant. The manufacturers may sell the goods, receive full pay for them, and yet retain full control over their disposition and selling price.

The due process clause is all embracing enough to prohibit such legislation. (*United States* v. *Yount*, 267 Fed. 861, 863):

> "It seems reasonably clear that the 'due process of law' of the Fifth Amendment is broad enough in its scope and purpose to include the 'equal protection of the laws,' which no state may deny to any person under the provisions of the Fourteenth Amendment. *Leeper* v. *Texas*, 139 U. S. 462, * * *; *Giozza* v. *Tierman*, 148 U. S. 657."
>
> "* * * the equal protection guaranteed by the Constitution forbids the legislature to select a person natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney fee in favor of plaintiff, when no other individual or corporation is subjected to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed."

The "Fair Trade Act" establishes arbitrary, discriminatory, unreasonable, and unjust classifications inhibited by the Constitution.

Chapter 38, Sec. 598, *et seq.*, Ill. Rev. Stats. 1935, is the state anti-trust act containing practically a re-enactment of the similar provisions of the Sherman Anti-trust Act. It provides for punishments for price fixing on any article of merchandise or commodity, and declares contracts relating thereto void, and relieving purchasers thereunder from paying therefor. Now under the "Fair Trade Act" a limited form of price fixing is permissible, and the anti-trust act is amended by implication.

Vendors and vendees of trade-marked or branded merchandise, as opposed to retailers of unbranded or non-trade-marked goods may fix the resale prices of their merchandise, free from the pains and penalties of the anti-trust act, whereas the latter, if they attempt to do so, subject themselves to the full penalty of the law. Non-assenting owners of trade-marked merchandise are compelled to abide by the prices fixed by third persons in contracts to which they are strangers, whereas retailers in unmarked merchandise are not so affected. Is there a reasonable basis for this classification?

The Illinois Supreme Court in its decision, 363 Ill. 559, 577, says the Fair Trade Act does not change the legislative attitude toward trusts. The act itself provides that the commodities permissible of price fixing, must be in "fair and open competition" with those of the general class.

The invalidity of a statute obnoxious to the fourteenth amendment is well illustrated by the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. The Illinois Trust Act of June 20, 1893, prohibited trusts or combinations

in restraint of trade or competition. By section 9 the provisions of the act were made inapplicable "to agricultural products or livestock while in the hands of the producer or raiser;" and section 10 provided that the purchaser of any article or commodity from such a trust or combination, should not be liable for the price and might plead the act as a defense to any suit therefor. Suit was instituted for sewer pipe sold and delivered and the act was interposed as a defense. The Supreme Court of the United States held that the discrimination created by the ninth section rendered the act repugnant to the provisions of the fourteenth amendment respecting the equal protection of the laws. The court said that under the "statute all except producers of agricultural commodities and raisers of livestock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturists and livestock raisers, in respect of their products or livestock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities within the limits of a State, and agriculturists and raisers of livestock, are all in the same general class, that is, they are all alike engaged in domestic trade which is, of right, open to all, subject to such regulations, applicable alike to all in like conditions as the State may legally prescribe."

This Court was unable to discover a reasonable basis for the legislative classification invoked to sustain the statute involved in *Connolly* v. *Union Sewer Pipe Co., supra.* The court said: "The difficulty is not met by saying that, generally speaking, the State when enacting

laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.'" The court declared that a statute such as the one under review was not a legitimate exercise of the power of classification; that it plainly denied the equal protection of the laws of those against whom it discriminated.

The Illinois Supreme Court, in its opinion, 363 Ill. 559, 580, seeks to distinguish this case in its applicability to the "Fair Trade Act" by indicating that the latter statute is designed to protect the goodwill established around a trade mark, brand or name. The retailer, however, in selling below the fixed price of the owner of the trademark, brand or name does not infringe upon the trademark, brand or name. The latter are adequately protected by the trade-mark statutes of Illinois, *i. e.*, Chapter

140, Sec. 7, Ill. Rev. Stats. 1935. This is the same argument employed by the Illinois and California majority in attempting to escape the rule that the business must be one "affected with a public interest" before prices therein may be regulated by statute. The fact remains that it is the price fixed by the owner of the mark or brand which is protected by the act, and not his good will. This court did not hesitate to say in *Tyson* v. *Banton*, 273 U. S. 418, that the price of the theater ticket was attempted to be regulated by the statute, and the dissent took the view that it was the profit of the "scalper" that was attempted to be regulated.

Here it is the price of the commodity and not the good will surrounding the same that is regulated by the statute. The Illinois Court used the same argument to distinguish, and for refusing to follow *Horwich* v. *Walker-Gordon Laboratory Company*, 205 Ill. 497, and a similar case of *Lippman* v. *People*, 175 Ill. 101, which is adequately discussed in its opinion, 363 Ill. 559, 578-579, and the answer to which is hereinabove contained.

The "Fair Trade Act" confers a special right and immunity upon owners of trade-marks, names or brands. Chief Justice Hughes, speaking for the court in *Dr. Miles Co.* v. *Park*, 220 U. S. 373, said that the claimed right to make resale price agreements was a claim of a special immunity or privilege.

The statute regulates and protects resale prices. Protection of good will of the trade-mark is a subterfuge to conceal the former. The statute is a price fixing statute despite all attempts to describe or defend it as the contrary. The legislative classification here attempted is not based upon any reasonable difference in situation. The power of the legislature to make a classification has been

here arbitrarily exercised. There is no reasonable, substantial difference in kind, situation or circumstance bearing a proper relation to the purpose of the law existing at the time of its enactment.

In *Adkins* v. *Children's Hospital* (1923), 261 U. S. 525, 67 L. Ed. 785, a board of three was given the power to fix the wages of women and children. The Court held the statute violative of the due process clause of the Fifth Amendment. The prevailing opinion says (p. 797):

> "In principle there can be no difference between the case *of selling labor and selling goods.* * * * Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support, and require the shop keeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed." (Italics ours.) Followed in *Morehead* v. *People ex rel. Tipaldo* (1936), Vol. 80, No. 16, U. S. Sup. Court (Law. Ed.) Adv. Op., p. 921.

In construing a statute, it is a well settled rule that the purpose and object of the law, the evil to be remedied and the wrong to be righted by the passage of the law should be considered and the meaning of words enlarged or restricted according to the true intent.

The Fourteenth Amendment to the Constitution of the United States provides among other things that no state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws. It seems obvious that such arbitrary selections for legislative favor, as are contained in the Fair Trade Act, were precisely what the constitutional provisions were designed to prevent. Classifications for legislative

purposes are properly determined on existing factual distinctions and legislation made applicable to a nominal class, to the exclusion of many actual members of such class is special legislation, and a denial of the equal protection of the laws.

The whole theory of representative government is opposed to special privileges. Cooley's Constitutional Limitations, (8th Ed., p. 816). Such privileges are always obnoxious, and discriminations against persons and classes still more so.

VI.

The means provided by the statute to achieve its purpose are unreasonable, arbitrary and discriminatory, and are wholly irrelevant to any legislative purpose.

Assuming, but not conceding, that the statute is enacted for a purpose within the constitutional powers of the legislature, nevertheless it provides means of accomplishment so irrelevant to any proper legislative purpose and permits of such an unreasonable, arbitrary and discriminatory use of power over the liberty and property of citizens that it is for these reasons alone unconstitutional.

Even a statute enacted for a valid purpose is unconstitutional if in its operation it is arbitrary or discriminatory, or if the means adopted to accomplish the purpose are not appropriate to that end.

This principle was recognized in *Nebbia* v. *New York*, 291 U. S. 502, 537, 539, where it was said by Mr. Justice Roberts:

> "* * * If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, * * *

"* * * Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. * * *"

Further recognition of this same principle is found in *Nectow* v. *Cambridge*, 277 U. S. 183; *Adams* v. *Tanner*, 244 U. S. 590; *Burns Baking Co.* v. *Bryan*, 264 U. S. 504; *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402; *Schlessinger* v. *Wisconsin*, 270 U. S. 230; *Liggett* v. *Baldridge*, 278 U. S. 105; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Washington* v. *Roberge*, 278 U. S. 116.

These cases condemn the statute now under consideration.

A. The means adopted by the Legislature to achieve its purpose are unreasonable, arbitrary and discriminatory.

(a) The challenged statute unconstitutionally vests in private persons arbitrary power to fix prices at which another may sell his own property.

This statute is a private price-fixing measure. The manufacturer is given unlimited and uncontrolled discretion to fix the selling price of another's property without his consent. The price fixed may be high or low, fair or unfair, reasonable or unreasonable. It may be fixed for any reason or for no reason, capriciously or arbitrarily, unwisely, erroneously or maliciously.

The price fixing power has not been given to any impartial State officer or public body. The statute provides no standard or regulation and imposes no limit upon the private price fixing power. No impartial State officer or public body even supervises the price fixed or assures its reasonableness. There is no review by any judicial or administrative body. Private individuals are left free

and unfettered in the exercise of their discretion over the price of another person's property.

Indeed, the legislature has given to private persons the unrestrained right to determine whether price fixing is necessary at all. There is no legislative finding that it is necessary. The Legislature has singled out no specific industry which, for special circumstances as found by the Legislature, requires special regulation. By this statute a private person may fix prices when and as he wills, for any reason or no reason, or he may refrain from doing so.

Not only has the Legislature given to private persons the power to determine when prices shall be fixed and how they shall be fixed, but it has likewise vested in such private persons arbitrary power to enforce the statute or not to enforce it as they, in their uncontrolled discretion, choose. Under the terms of the statute, non-observance of the fixed price is not made a crime, and no public body is authorized to compel observance of a fixed price. The only sanction provided by the statute is an action for damages or a suit for an injunction at the behest of private persons. These private persons may enforce the statute against one retailer and not against another. Their reasons for doing so may be capricious or even malicious. One retailer may have his prices fixed so that he cannot compete with numerous other retailers who may not be coerced into observance of the fixed price.

Furthermore, the statute, by empowering the manufacturer or a competing retailer to fix the prices that another retailer may charge, has enabled private persons to nullify completely the economic advantage which a retailer may enjoy because of superior efficiency, low rent, volume, buying power, cash selling, etc. The statute per-

mits private persons to confiscate without compensation that which may be the retailer's most valuable asset, to-wit: his good will resulting from his superior efficiency and his customers' approval and confidence in his method of doing business built up by many years of effort and financial outlay.

In many cases a retailer's chief appeal to his customers is a price appeal. He is able to sell for less because of efficiency, low overhead, and his refusal to provide the elaborate services which other stores provide. To compel uniform prices is to compel certain retailers to sacrifice their customers to other stores with more elaborate services and facilities. The consumer will ultimately be obliged to pay for these frills of merchandising whether he desires them or not.

(b) The cases hold that the Legislature cannot constitutionally give to private persons such unlimited power over the liberty and property of other persons as this statute attempts to give them. The power is too unrestrained and too susceptible of abuse.

That the Legislature cannot constitutionally delegate to private persons control over the liberty and property of other persons is further established by *Eubank* v. *Richmond,* 226 U. S. 137. There, the City of Richmond, pursuant to legislative authority, passed a zoning ordinance which required the Committee on Streets to fix a building line not less than 5 feet nor more than 30 feet from the street line as and whenever the owners of two-thirds of the property abutting on the street requested the Committee to establish such line. Pursuant to the request of the owners of two-thirds of the abutting property, the Committee ordered a property owner to remove all portions of a building under construction so

that it did not over-extend the line fixed by the abutting property owners. For violation of the ordinance the plaintiff in error was fined. Upon appeal to the Supreme Court of the United States the judgment was reversed and the ordinance was declared unconstitutional as depriving the plaintiff in error of property without due process of law. It was admitted that the zoning ordinance was a proper object of government, just as here it is admitted for purposes of argument of this point that price fixing is a proper legislative purpose. It was contended that the particular portion of the zoning ordinance which vested in private persons power over other persons' property was arbitrary and unrelated to any admittedly valid purpose. This contention was upheld. Mr. Justice McKenna, speaking for a unanimous court, said (pp. 143, 144):

> "In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determines not only the extent of use, but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience, or welfare served by conferring such power? This statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed, in the same locality. There may be one taste or judgment or comfort or convenience on one side of a street and a different one on the other. There may be diversity in other blocks; and, viewing them

> in succession, their building lines may be continuous or staggering (to adopt a word of the mechanical arts) as the interests of certain of the property owners may prompt against the interests of others. The only discretion, we have seen, which exists in the street committee or in the committee of public safety, is in the location of the line, between 5 and 30 feet. It is hard to understand how public comfort or convenience, much less public health, can be prompted by a line which may be so variously disposed.
>
> "We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others; and property determined, as the case may be, for business or residence—even, it may be, the kind of business or character of residence. One person having a two-thirds ownership of a block may have that power against a number having a less collective ownership. If it be said that in the instant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by other owners of property, exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power."

Tested in the manner and by the same standards used by the Court in the Eubank case, the statute here challenged will be found subject to all and more of the infirmities which there condemned the statute.

Again in *Washington* v. *Roberge*, 278 U. S. 116, this Court condemned a zoning ordinance, admittedly enacted for a valid purpose, because the means adopted in the ordinance to achieve its purpose were arbitrary and unreasonable. The City of Seattle had passed a zoning ordinance which provided, among other things, that a philanthropic home for old people might be established in a certain neighborhood only with the written consent of

the owners of two-thirds of the property within a certain area adjacent to the proposed home. The plaintiff applied for a permit to erect such a philanthropic home without obtaining the consent of the surrounding property owners. The permit was refused and action was brought to compel its issuance. The plaintiff contended that the particular portion of the zoning ordinance relating to homes for the aged was arbitrary and unrelated to any admittedly valid general purpose. In upholding this contention, Mr. Justice Butler, speaking for the Court, said (pp. 121-122):

> "The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily, and may subject the trustee to their will or caprice. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366, 368, 30 L. Ed. 220, 225, 226, 6 Sup. Ct. Rep. 1064. The delegation of power so attempted is repugnant to the due process clause of the 14th Amendment."

In the case at bar there is the same delegation of arbitrary power to individuals "uncontrolled by any standard or rule prescribed by legislative action." This power may be exercised by individuals arbitrarily, for selfish reasons, or for no reason at all. Here, as in *Washington* v. *Roberge*, the delegation of power so attempted is repugnant to the due process clauses of our Constitution.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, this Court held unconstitutional an ordinance of the City of San Francisco which vested in a governmental body arbitrary power to

issue or refuse business licenses without any standard set out in the law itself. Mr. Justice Matthews, speaking for the unanimous Court, said (p. 369):

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. * * * For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

In *Yick Wo* v. *Hopkins,* the Court held unconstitutional a delegation to a governmental body of power over other people's property, there being no standard or regulation prescribed by the legislature. *A fortiori,* we submit, the delegation of price fixing power to private individuals by the statute here under consideration is unconstitutional as depriving citizens of liberty and property without due process of law.

The statute involved in the instant case gives to private persons unlimited power, not only to remove a restriction imposed by the legislature, but to impose restrictions on other people's property. The statute therefore must be condemned upon the authority of the cases above cited.

(c) The argument that competition between brands will prevent all arbitrary, unreasonable and discriminatory price fixing is without merit.

It has been asserted by proponents of this legislation that no producer will set too high a price on his product because he must meet the competition of other branded goods of the same general class.

There is doubt that there ever can really be "free and open competition" if a brand is well advertised. There is sworn evidence in a very recent decision of a Federal Court that the manufacturer can and will charge "whatever the traffic will bear." (*Bourjois, Inc.*, v. *McGowan, Collector*, 12 Fed. Supp. 787.

The Court states:

> "This litigation arises from plaintiff's attempted concealment of its selling price through the organization of sales corporations. * * * The conclusion follows that the method by which the plaintiff determined its selling price was a mere cover and a fraud upon the Government."

The finding of the Court shows how a producer, acting through a subsidiary, or a collusive retailer, under the "Fair Trade Act" could mulct the public. What protection would an independent retailer, large or small have, if required to determine quickly at his peril the resale fixed price in some contract, oral or written, against the fraudulent manipulation of prices as demonstrated in the case cited?

Moreover, although brand owners may be free to compete, there is the trade association which manages "by informal means to bring about concerted policies designed to 'stabilize' the industry." The surest means of restricting competition among manufacturers is a method whereby each manufacturer can control the dealers. If the dealers' resale price can be controlled and each manufacturer can force every dealer to maintain his fixed price by damage suits and injunction, then by "informal means" the manufacturers of a particular commodity have little difficulty in raising their prices and maintaining them for their own advantage. Given a vertical resale price combination, forced on all dealers by statute, "free and open competi-

tion'' among manufacturers in any real sense becomes a myth. Under such a system the manufacturers could destroy a retailer. Even where the law merely legalizes resale price contracts between parties thereto as in England, and does not (as this statute does) bind non-assenting parties, the result to small retail booksellers in England has been disastrous and the public has been compelled to pay exorbitant prices, according to the Encyclopedia Brittanica. (Article on ''Publishing''.)

If all retail dealers in a commodity, branded or unbranded, voluntarily combined state-wide to sell it at a fixed price, nobody would question the illegality of such a combination and the harm to the consuming public resulting from the elimination of retail competition. The effect of this statute is much worse because under it every retailer in the State can be regimented, whether he wishes to join the combination or not, at the arbitrary command of the manufacturer.

Further, this argument completely ignores the fact that there are different costs of retail distribution which are reflected in the retail price. A retailer who has an expensive location, who extends long-term credit, who has elaborate fixtures, who employs high-trained sales clerks, who exchanges goods freely, who has an elaborate delivery service, and numerous other services, must charge more than a retailer who has a low overhead, who operates a less elaborate store on a cash-and-carry system, and who does not give much service. Similarly, the efficient retailer and the retailer who does a large volume of business may be able to sell for less than a similar type of retailer who is less efficient and who does a smaller volume of business. The price which the consumer ultimately pays is higher if the particular retailer with whom he deals has a high dis-

tribution cost. The consumer pays not only for an article, but for the services and facilities that go with it.

The statute here involved puts a premium on inefficiency, and on high operating costs, and compels the consumer to pay for services which in most cases he cannot afford and therefore does not desire. The statute, moreover, deprives a retailer of what may be his most valuable asset, namely, his good will acquired over many years as the result of giving his customers the best goods possible for the least money, by reason of superior efficiency and an economical method of doing business.

This very argument now urged by the Illinois Supreme Court has been urged in support of the Stevens bill and the Capper-Kelly bill before they were defeated by Congress. The consumers recognized that, despite the argument, it is the consumer who pays the bill for price fixing. That is why 72 per cent of the consumers who answered the questionnaire of the Federal Trade Commission were opposed to legislation permitting resale price fixing. (Federal Trade Commission Report on Resale Price Maintenance, 1931, p. 157.) That is why consumers' organizations, farmers' organizations, have opposed price-fixing bills. These organizations know what price fixing does to the purchasing power of their members.

As Professor Paul H. Nystrom, of Columbia University, in a recent pamphlet entitled "Dangerous Trends Under the NRA," stated (p. 8):

> "Ultimately, however, the effect of all price fixing will be to increase the cost of goods to consumers. It is upon the consumer that the real burden of price fixing falls."

The Illinois Supreme Court's position, moreover, does not meet the possibilities of arbitrary enforcement of this statute by a producer or by a retailer against some retailer and not against others.

Furthermore, the argument assumes a divine power of foresight in the manufacturer to fix the proper retail price at which products bearing his brand will move, and which will be fair to the retailer and to the consuming public. It overlooks the fact that if the manufacturer, because of ignorance, mistake, spite or malice fixes an unfair price, it is the retailer and the consumer who must bear the injury of price maladjustment.

Moreover, the whole theory that competition among competing brands will automatically fix the proper price level for each brand is inimical to the very argument upon which the price-fixing producers rely to show the need for any price-fixing statute. On the one hand, these producers say that the public is unable to ascertain the merit of articles and, consequently, is misled and overcharged on certain goods because of price cutting on other goods. In the same breath, these same price-fixing producers say that the public will, of itself, discriminate between various brands so that if the price of one brand is raised, public patronage will switch to other brands. Such concomitant ignorance and wisdom on the part of the consumer remains one of the unexplained mysteries of the price-fixing psychology.

Finally, it is not true, as an economic fact, that competition between brands will automatically fix the price of each trade-marked, branded or named article. The success of a brand, and of the advertising campaigns which are conducted in connection with branded goods, lies in their ability to take branded articles out of competition with other articles.

While it is true that the price of a text book published by one person, may not be raised to $100 and still compete with a similar text book which is published by another and sells for $1, it is not true in the absence of price competition that the price of the first text book may not be raised, say

to $1.50 and still compete with the second text book if a sufficiently vigorous advertising campaign is undertaken.

B. The means adopted by the legislature in the challenged statute are wholly irrelevant to any constitutional legislative purpose.

At the outset, we note that more is required to sustain a legislative curtailment of liberty and property than a mere legislative finding that some evil exists and the adoption of some means of eliminating the supposed evil. Here, it may be noted there is no legislative finding stated in the statute. There was no legislative investigation. The only purpose that can be gleaned from the statute is that the object is to give manufacturers the absolute power to fix resale prices and to prevent anybody from selling for less. Despite smoke screens about selling under cost and loss leaders, we submit the real purpose is the result effectuated by the statute.

There are limits imposed by the Federal Constitution upon legislative action. The constitutional guarantees of our citizens are not to be subverted by legislative "experiments".

See:

New State Ice Co. v. *Liebmann*, 285 U. S. 262, 280.

Democracy itself, like free competition, has some evils. At times it produces demagogues, corrupt lobbies and ignorant legislators. Its enactments are sometimes adopted without due consideration or debate and, like the statute here challenged (as the records of the Assembly show), such enactments are often suddenly propelled through committee and passed in the confusing and closing hours of a legislative session without debate. Such evils, however, cannot afford a constitutional justification for legislation

abolishing democracy and substituting for it communism, fascism, monarchy, oligarchy, bureaucracy or some other form of government. Such legislation might abolish some evils of democracy, but it would also transgress the Constitution.

Even a statute for a valid constitutional purpose is unconstitutional, if the means adopted are inappropriate. The suppression of kidnapping, the promotion of child welfare and education, the encouragement of patriotism and the prevention of race conflict are all valid legislative purposes. A statute requiring all minors to be kept in a State institution under guard until majority would undoubtedly tend to prevent kidnapping. A statute requiring that all children be reared in governmental barracks and not in their parents' homes might promote patriotism. A statute requiring children to be taken from their parents and reared by official guardians might produce a better educated race and more useful citizens. A statute prohibiting sales of residential property in certain localities to negroes might prevent race conflict by keeping white people and colored people apart. Yet, we know that every one of such statutes would be unconstitutional under our system of government as depriving our citizens of liberty or property without due process of law.

See:

Meyer v. *Nebraska*, 262 U. S. 390.

Pierce v. *Society of Sisters of the Holy Name*, 268 U. S. 510.

Buchanan v. *Warley*, 245 U. S. 60.

With due respect, neither gubernatorial nor presidential proclamation or opinion, nor legislative preamble, as to supposed economic conditions can deprive any citizen of his constitutional rights of liberty or property. (*Schechter* v. *United States*, 295 U. S. 495.)

In particular, the history of the statute here challenged does not lend support to its constitutionality. The Act was passed to perpetuate the waning powers of price fixing under the then dying NRA. It was sired by that unconstitutional creation. On February 20, 1935, President Roosevelt stated publicly, "Monopolies and private price fixing must not be allowed nor condoned." On May 1, 1935, the Senate Finance Committee resolved, "No price fixing shall be permitted or sanctioned under the provisions of any code." On June 14th, Congress practically wiped out what was left of the NRA by repealing power to approve any code contrary to the anti-trust laws. The death knell of code price-fixing being sounded in February, the price-fixing interests rushed to state legislatures and within the space of about three months managed to obtain legislation in eight or nine states similar to the act challenged, preserving and in some cases extending the price-fixing provisions of certain NRA codes.

The booksellers' NRA code gave the right to make all retailers sell at publishers' fixed prices. This statute is, however, even more arbitrary because the code at least provided for some sort of review by a board composed of the NRA administrator, a consumers' representative and a bookseller. It only permitted the price fixed to stand for one year after publication. This statute is without limit.

(a) If it be assumed, contrary to fact, that the prevention of the use of "loss leaders" is the purpose of the statute, the means adopted for the prevention of such practices are wholly irrelevant to that purpose.

The term "loss leader," we assume, refers to the practice of selling goods below cost merely for the purpose of attracting customers to buy other goods.

There is no charge in this case that the defendant has

ever sold any of the merchandise referred to in the complaint or any other article of merchandise as a loss leader.

On the contrary, the Court states it sold at a profit (363 Ill. 610, 612).

Much of the hue and cry about price cutting and loss leaders is merely a mask to hide the real purpose of the price-fixing interests. The so-called evils are obviously exaggerated by those who want not so much to abolish loss leaders as to fix the one and absolute price at which every retailer must sell. The Brookings Institution in its NRA survey states under the caption of "Effect of Abolishing Loss Leaders" that "thinking on the matter is muddled * * * *. The loss-leader problem is one of those far too frequently discussed with easy assumption and with a utilization of question begging words playing the role of fact and analysis."

"Price-cutting" is merely an invective phrase to describe a practice which somebody does not like. As the Federal Trade Commission stated in its Report on Retail Price Maintenance, 1931 (p. 9):

> "Meaning of 'Price-Cutting.' As is commonly used in referring to price competition among distributors, price-cutting is a term of extremely variable, often indefinite meaning, applied to any form of price competition regarded as objectionable by the user of the term * * *. The principal significance of the term, therefore, is that it indicates objection to the practice by someone."

The Federal Trade Commission, after an impartial investigation, found that the loss leader talk was much overstressed. The Commission's report states (p. 4):

> "The Commission has been at some pains to find instances of such price-cutting which were sufficiently severe to result in a permanent and material reduction of the manufacturer's volume of business, but without

discovering any instances in which it could be satisfactorily shown that decreased value was primarily due to dealer price-cutting. The reports received from dealers regarding their purchase prices and selling prices very rarely showed selling prices below the purchase prices."

And at page 162:

"No instance has yet been brought to the Commission's attention in which there was conclusive evidence that an article of real merit had been driven off the market by price-cutting alone."

If loss leaders constitute the evil plaintiffs claim they do (and for argument assuming constitutional power in the premises), the statute here under consideration goes beyond the constitutional bounds of legislative power in combatting that evil. This statute provides that no one can sell his own property below a price fixed by a manufacturer in a contract to which the owner of the property is not a party. The price fixed by the manufacturer has no relation whatever to cost. Under the statute private persons by a contract between themselves may fix the resale price of another's property at whatever level they select and may prohibit a retailer from selling even at 100 per cent profit, if they think the retailer should exact a 200 per cent profit.

Even if the prohibition of loss leaders is a valid legislative purpose, neither the Constitution of this State nor of the United States permits the adoption of the means of suppression enacted by the statute here challenged. The statute, because of its broad scope and all-inclusive character, completely restricts the liberty and property of persons whose price policy, like the defendant's, has no relation to "loss leaders."

This Court in *Tyson* v. *Banton*, 273 U. S. 418, in holding unconstitutional a State statute purporting to regulate the

resale price of an ordinary commodity (theater tickets), condemned the statute for this reason, among others, and said (pp. 442, 443):

> "It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets, and the like. That such evils exist in some degree, in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect of the same or similar evils in other kinds of business. But evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion or extortion (if that word can have any legal significance as applied to transactions of the kind here dealt with—*Com.* v. *O'Brien,* 12 Cush. 84, 90), and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught."

This Court expressed similar views in condemning legislation restrictive of lawful business in *Adams* v. *Tanner,* 244 U. S. 590, 594, 595, and in *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1, 9, 10.

The Court of Appeals, in *People ex rel. Moskowitz* v. *Jenkins,* 202 N. Y. 53, voiced the same opinion in holding unconstitutional an ordinance which under the guise of preventing fraud placed a prohibitive tax on itinerant vendors selling bankrupt or damaged stock. The Court, per Chief Judge Cullen, said (pp. 58-59):

> "As already conceded, the device of selling goods as bankrupt or damaged stock does excite the cupidity or economical instincts of customers and does tend to draw custom from other merchants, but a customer has the right to buy where he can buy cheap, and his means may unfortunately be so narrow that he is constrained to purchase damaged or unfashionable goods. The great department shops of New York do practically the same thing as that restrained by the statute. They advertise a reduction in prices of stock which they have been unable to freely dispose of, often to a point below cost. Every one has the right to adopt such means to sell his goods and conduct his business as he finds most profitable to him, provided those means are honest, and the fact that some persons engaged in the same business are dishonest does not justify legislation prohibiting either directly or indirectly the business. (*People ex rel. Tyroler* v. *Warden, etc.*, 157 N. Y. 116; *Wright* v. *Hart*, 182 *id.* 330.)

For the application of this identical principle to similar facts by the Supreme Court of Illinois, see *City of Carrollton* v. *Bazzette*, 159 Ill. 284, 299, 300, where a city ordinance was held unconstitutional because under the guise of regulating itinerant merchants, the real purpose was to protect the local merchant from competition.

In determining whether the means adopted by the legislature in this statute result in a deprivation of liberty or property without due process of law, the Court is always free to inquire into the real effect of the statute regardless of the purpose attributed to it, either by those seeking to uphold it or by the legislature itself. If the Court finds that the statute is without substantial relation to some evil within the power of the State to suppress, or that it unduly restricts liberty or property, it is the duty of the Court to declare the statute invalid. (See *Fairmont Creamery Co.* v. *Minnesota, supra*, at p. 11.)

Despite the cry of loss leaders, the statute here under

consideration shows on its face that it is an attempt to prevent citizens from exercising their liberty and their property rights, and to suppress free competition with respect to dealing in ordinary commodities. No matter how the statute may be described, this is its effect. Such being the case, it is as unconstitutional as was the statute held invalid in *People ex rel. Moskowitz* v. *Jenkins, supra.* There the Court perceived that a statute purporting to be enacted for the prevention of fraud was really to suppress competition with local shopkeepers. The Court said (p. 58):

> "These features of the statute plainly show its purpose, which is not to safeguard customers against fraud, but local shopkeepers from competition."

The Court also quoted with approval the following language from *People* v. *Gillson,* 109 N. Y. 389, 399:

> "It is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community against the fair, free and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors."

So, even if we assume that the challenged statute seeks to prevent the use of loss leaders, the legislature was without constitutional power to forbid all retail competition and to compel all retailers to sell their own property at a price fixed by another in order to achieve the legislative purpose.

(b) If it be assumed contrary to fact that the prevention of predatory price cutting (meaning thereby price cutting with deliberate intent to injure other persons) is the real object of this statute, then the statute in applying indiscriminately to all sales of all commodities at a price less than that fixed by a manufacturer has transcended the constitutional limits of legislative power.

It is not such predatory price cutting that is condemned by this statute. Under the statute, the price fixed by private persons applies irrespective of the retailer's motive or intent in selling his own property at another price and irrespective of the effect of the retailer's prices on competitors. A retailer cannot sell below the price fixed by a manufacturer, although his sales may be at a price profitable to him or to anyone else who sells at that price. A retailer cannot capitalize on his efficiency and low overhead. He is obliged to charge his customers a higher price than he otherwise might, although they canont pay it without foregoing the gratification of other wants.

In this case in particular there is no charge of predatory price cutting against this defendant. There is no allegation that the defendant's prices are fixed with an intent to injure or destroy competitors. On the contrary, it affirmatively appears from admitted facts that the defendant is merely meeting competition, and is passing on to its customers whatever savings it can, due to its policy of cash selling, its volume and its efficiency.

Even though a statute which prohibits price cutting for the deliberate and definite purpose of injuring others might be upheld, this statute, which prohibits selling below the price arbitrarily fixed by a private person, irrespective of the retailer's motive, cannot be upheld. This is shown by a comparison of *Fairmont Creamery Co.* v. *Minnesota,* 274

U. S. 1, and *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157.

In the latter case, this Court upheld the constitutionality of a South Dakota statute which prohibited price discrimination "for the purpose of destroying competition of any regular, established dealer in such commodity or to prevent competition of any person who in good faith intends to become such dealer."

In the Fairmont Creamery case, this Court held invalid a Minnesota statute which prohibited price discriminations without regard to the motives behind them. This difference between the South Dakota statute in the Central Lumber case and the Minnesota statute in the Fairmont Creamery case was sufficient to invalidate the latter.

The statute here involved is not only not limited to predatory price cutting, but it is not intended to be so limited. The aim and purpose of the statute is to enable manufacturers to fix the resale prices of their products after they have parted with ownership thereof, and after the same are owned by other people and have entered into the channels of trade.

The statute is a general price-fixing statute applicable to all commodities and is not aimed at any particular price-cutting evil if, indeed, there exists such an evil. This important fact cannot be obscured by legalistic conceptions advanced in Law Review articles about "equitable servitudes;" nor irrelevant speculative analogy as to possible extension of tort, contract or trade-mark rights.

(c) The constitutionality of this statute cannot be sustained merely because it confines price fixing to goods bearing the producer's trade-mark brand or name.

(1) The sole function of a trade-mark is to designate goods as the product of a particular trader and to protect his good will against the sale of another's product as his.

The power to protect trade-marks and good will does not imply the power to invade the Constitution and fix prices and the Fair Trade Act is arbitrary, and unnecessary, because the declared purpose of protecting the trade-mark owner, distributor and the public can be accomplished by laws other than price fixing.

The law of trade-marks is but a part of the broader law of unfair competition and its sole purpose is to prevent "passing off" a species of fraud. (*United States* v. *Schechter*, 295 U. S. 495.)

These fundamental principles are declared in numerous cases. For example:

> "The law of trade-marks is but a part of the broader law of unfair competition; the right of a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his good will against the sale of another's product as his; * * *." (*United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90, 97, 98.)
>
> "A trade-mark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his." (*Prestonettes, Inc.*, v. *Coty*, 264 U. S. 359, 368.)

From this basic concept of a trade-mark is deduced the correlative rule that a trade-mark, unlike a patent or copyright, gives no right to prevent a third person from using goods bearing the mark in any manner he chooses, provided that he tells the truth and does not palm off his goods

as those of a trade-mark owner. (See *United Drug Co.* v. *Rectanus*, 248 U. S. 90, 97-98.)

The owner of goods bearing another's trade-mark may repack them, break them up, compound them with other products and resell them in an altered state provided that he tells the truth. Such was the holding of this Court in *Prestonettes* v. *Coty*, 264 U. S. 359, where Mr. Justice Holmes, speaking for the Court, said (p. 368):

> "The defendant, of course, by virtue of its ownership, had a right to compound or change what it bought, to divide either the original or the modified product, and to sell it so divided. The plaintiff could not prevent or complain of its stating the nature of the component parts and the source from which they were derived, if it did not use the trade mark in doing so. For instance, the defendant could state that a certain percentage of its compound was made at a certain place in Paris, however well known as the plaintiff's factory that place might be. If the compound was worse than the constituent, it might be a misfortune to the plaintiff, but the plaintiff would have no cause of action as the defendant was exercising the rights of ownership and only telling the truth. The existence of a trade-mark would have no bearing on the question. Then what new rights does the trade-mark confer? It does not confer a right to prohibit the use of the word or words. It is not a copyright. The argument drawn from the language of the Trademark Act does not seem to us to need discussion. A trade-mark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his. * * * When the mark is used in a way that does not deceive the public, we see no such sanctity in the word as to prevent its being used to tell the truth. It is not taboo * * *."

To the same effect see:

Russia Cement Co. v. *Frauenhar*, 133 Fed. 518.

The presence of another's trade-mark upon goods which one lawfully owns does not permit the trade-mark owner to

limit in any manner the sale of such goods. In *Gorham Mfg. Co.* v. *Emery-Bird-Thayer Dry Goods Co.*, 92 Fed. 774, aff'd 104 Fed. 243, the Court stated (p. 779):

> "When a manufacturer parts with his goods, and they go upon the market, any third person has the right to purchase and sell them as he pleases, without the consent of the manufacturer; and the courts will not aid the manufacturer, under the guise of protecting his trade-mark or the suppression of unfair competition, by permitting him in such litigation to discover the sources from which an objectionable merchant—to him—obtains his supply."

See, also:

Vitascope v. *United States Phonograph Co.*, 83 Fed. 30.

Similarly it is established by numerous decisions that a trade-mark, brand or name gives the manufacturer no right to fix the resale prices of other people's property.

John D. Park & Sons Co. v. *Hartman*, 153 Fed. 24;

Dr. Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U. S. 373;

Boston Store v. *American Graphophone Co.*, 246 U. S. 8;

Federal Trade Commission v. *Beech-Nut Packing Co.*, 257 U. S. 441;

Straus v. *Victor Talking Machine Co.*, 243 U. S. 490;

Bauer v. *O'Donnell*, 229 U. S. 1;

Bobbs-Merrill v. *Straus*, 210 U. S. 339.

In short, there is nothing mysterious about a trade-mark. It is a mark of origin and nothing more. Its sole function is to prevent another from passing off his goods as those of the trade-mark owner. A trade-mark affixed to goods gives the owner no property in the goods after he has sold

them. He cannot then, by virtue of his trade-mark, limit the use or disposition of the goods or fix the resale price.

(2) The constitutionality of this statute is not sustained by giving to a trade-mark (or a brand or name that is not a trade-mark) a legal effect which, in its nature, it cannot have.

The whole argument as to the power of the trade-mark owner to evade the constitutional inhibitions against deprivation of liberty of property without due process of law is a linguistic trick. It is said, in effect, that although the Constitution forbids the legislature to fix the selling price of any ordinary commodity, and *a fortiori* to delegate the unfettered power so to do to private persons, the legislature, nevertheless, by defining the term "trade-mark" as something other than it is, can evade the constitutional limitations upon legislative power. In other words, by the device of calling private price-fixing an attribute of trade-mark ownership, the legislature can decree that no one can sell his chair, or his desk, or any other article which he owns, except at a price fixed by another; and all that is necessary to make such a price-fixing statute constitutional is the stamping of a name or brand on any article of commerce.

If we pursue this argument somewhat further, it becomes even clearer that it is simply word-play to avoid the constitutional guaranties of liberty and property. The statute's defenders say that a statute is valid if it provides that where a manufacturer of chairs affixes a cross or an arrow or his name to his chairs, and contracts with a single retailer that the latter shall not resell such chairs for less than a given price, then every other retailer who buys such chairs for resale is restrained from selling below that price, although he has signed no such contract and has even refused to sign it. If one manufacturer of chairs can do

this, so can all the other manufacturers of chairs. If manufacturers of chairs can do it, so can the manufacturer of tables, flour, bread, cosmetics, books, medicines and every other article used by man. We thus have a complete and all-comprehensive system of price-fixing affecting all ordinary commodities. And all this is accomplished, with due respect to the Constitution, merely because the legislature, instead of calling price-fixing by its true name, has called it an attribute of trade-mark ownership. By this very clever device the legislature, it is asserted, can enact a permanent system of private price-fixing applicable to all ordinary commodities and all businesses, although the United States Supreme Court and this Court have said time and again that the Constitution forbids it.

The proponents of the statute argue that the manufacturer of an article bearing a mark or brand should have the right to fix the resale price even against a retailer who owns the article but has failed or refused to sign a price-fixing agreement because such a retailer is not required to buy the article; that if he buys after notice he "consents" to the restriction (despite actual refusal to assent); and that no right of the retailer is invaded because the manufacturer is not required by law to sell him.

In the first place, the retailer may not have bought from the manufacturer. He may, after the manufacturer has put the goods into the channels of trade, have purchased from a third party who was entirely willing to sell without any restriction and who may or may not have made a contract with or without restriction with the manufacturer.

But the argument proves too much. It destroys the claim that it is a trade-mark which is supposed to give price fixing powers. The manufacturer of any commodity even without a mark is not required to sell his goods to another. Similarly, the retailer is not required to buy. But if he

does buy, does the fact that the manufacturer of the unbranded goods was not required to sell give such manufacturer the right to fix the resale price in the absence of a voluntary contract? If not, then how does the mere right not to sell on the part of the manufacturer using a brand affect the purchaser's right to resell at whatever price he pleases? If the right to choose customers is the test, both manufacturers of branded and unbranded goods have the same right. If the latter cannot constitutionally impose price restrictions on the buyer's property without his consent, neither can the latter.

The constitutionality of this statute must be judged by what it does. (See *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1; *People ex rel. Moskowitz* v. *Jenkins*, 202 N. Y. 53.) It provides for private price-fixing applicable to all commodities subject only to the will of the manufacturer. No matter how it is described or disguised it does just that. Price-fixing by whatever name is still price-fixing and a statute which so provides under the authorities cited is unconstitutional.

(3) The constitutionality of this statute cannot be sustained under the guise of protecting trade-mark owners' good will.

Plaintiffs assert that price-cutting (whatever it may mean) injures trade-mark owners' good will, and that legislation to protect that good will may constitutionally permit manufacturers to fix the resale price of branded articles after they have sold them.

We challenge the basic assumption of this argument. Reselling a trade-marked article for less than the price arbitrarily fixed by the manufacturer does not damage the latter's good will in any proper sense of that term. A merchant enjoying a profitable business could not be protected (under the theory of "protecting his good will") by

a statute prohibiting other merchants from moving into his vicinity, and by lower prices and more efficient operation, attracting his customers. Reselling for less than the manufacturer's fixed price is in no sense passing off another's goods as his. It is no reflection upon the quality of the goods bearing his mark. Indeed, selling below the fixed price may enhance the manufacturer's good will if he has a product of merit, by enlarging its use and by making it available to people who could not afford to buy it at a higher price.

If, however, we assume that ordinary honest commercial transactions, such as have heretofore always been regarded as beneficial, impair somewhat the manufacturer's good will, the legislature cannot forbid such transactions merely to benefit the manufacturers. Although the abolition of the exercise of liberty and property rights of some might benefit others, citizens cannot be deprived of their liberty or property except for a proper public purpose and by proper means.

Mere benefit to one group is not sufficient to justify a statute which deprives others of liberty or property. The inhabitants of a city might be benefited if all butchers were required to give away their meats; yet we know that a statute requiring this would be void. Some merchants would be benefited if others were prevented from competing with them; yet we know that a statute proscribing such competition would be invalid. (*People ex rel. Moskowitz* v. *Jenkins*, 202 N. Y. 53.) The owners of existing ice plants would doubtless be benefited by closing the ice business to newcomers; yet we know that the state may not do this. (*New State Ice Co.* v. *Liebmann*, 285 U. S. 262.) White people owning real property in a certain locality might enjoy enhanced property values because of a statutory prohibition of sales of real property in the locality to negroes;

yet we know that such a statute is unconstitutional. (*Buchanan* v. *Warley*, 245 U. S. 60.)

It is certainly a novel doctrine of constitutional law that the legislature may deprive one person of his liberty and property for the benefit of another. The true doctrine is that no person shall be deprived of his liberty or property without due process of law, even though others might benefit by such deprivation. The urban population may not be taxed to benefit the farmer, when the AAA was held unconstitutional in *U. S.* v. *Hoosac Mills*, 297 U. S. 1.

Even if the assumed benefit to trade-mark owners or certain others were sufficient to justify the purpose of this statute, it could not justify the means adopted. The legislature, as the cases above cited show, cannot place in the hands of private persons the unlimited and unrestrained power which this statute lodges there.

(4) The constitutionality of the statute cannot be sustained by the argument that a retailer buying branded goods with knowledge of an existing contract between the manufacturer and someone else fixing a resale price on other goods bearing the brand takes subject to the price restriction.

Unless the statute upon which the plaintiffs rely can be upheld, there is no price restriction on property acquired by one who has himself made no contract merely because he has knowledge of a price fixing contract between other persons. Plaintiffs assume the validity of the statute to sustain the claimed limitation on property, and then they assert that the limited property interest sustains the statute.

In fact, the plaintiffs' argument on this point is just mere word-play. Just as plaintiffs have attempted to sustain private price fixing of ordinary commodities by attributing price-fixing powers to trade-mark ownership,

rather than calling them what they are, so here they attempt to disguise price-fixing by asserting that the property which a retailer has in branded goods is a limited property.

The plaintiffs' argument comes merely to this. The statute gives a manufacturer the power to fix the resale price on any article of commerce which other persons own, if the article bears the manufacturer's brand or name. Plaintiffs then describe this situation as a reservation of property in the manufacturer and a limitation upon the property acquired by the other persons. They conclude from this that the statute is merely defining property rights; that therefore it does not deprive anyone of property; and that therefore by these magic words the legislature has hurdled all of the constitutional barriers forbidding a private price-fixing statute covering practically all commodities.

It is to be noted that this argument is entirely the plaintiffs' creation. The statute itself does not speak of reserving any property to the manufacturer or limiting any property of the retailer. It speaks of a sale and by the terms of the statute price-fixing power is given to private persons after they have sold the property over which the power is to be exercised. By its express language the statute speaks of the buyer as "the owner" (Sec. 1 (2) (a)). The very language of the statute is repugnant to plaintiffs' argument here considered.

In *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, this court held that a sale was a sale, and that an attempt by a vendor to sell the property and reserve the power to fix prices by the device of calling the sale a patent license would not be tolerated. The Court, by Mr. Justice Clarke, said (pp. 500-501):

"Courts would be perversely blind if they failed to

> look through such an attempt as this 'License Notice' thus plainly is to sell property for a full price, and yet to place restraints upon its further alienation, such as have been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest."

Furthermore, the statute itself completely destroys plaintiffs' argument about a reservation of power in the trade-mark owner to protect his own property interest. The statute gives price-fixing powers to "any vendor." Thus one who does not own the trade-mark, and who has no good will attached thereto, may "reserve" to the trade-mark owner a "property" which he did not reserve to himself, and limit the property of a retailer who never consented to any limitation on the property which he bought.

The legislature cannot deprive citizens of liberty or property without due process of law merely by changing the definitions of property. It cannot by definition in effect take from one person and give to another. It cannot by definition deprive citizens of their right to acquire, use and dispose of the ordinary commodities used in daily life nor can it under the guise of defining property restrict liberty. No legislature can define away the Constitution.

A statute, for example, could not prohibit the sale of real property in a given area to negroes, although the prohibition of such sales was avowedly for the purpose of protecting the property values of other property owners who had lived in the area for generations, who had invested money in the improvement of their own property, and who had landscaped and beautified the area. (See *Buchanan* v. *Warley*, 245 U. S. 60.) Such a statute could not be upheld by asserting that it merely "limited" or "defined" the property of a particular person for the benefit of other property holders whose property might be depreciated in value by the proscribed sales.

If the constitutional guaranties are to be evaded by any such legislative definition of terms (and again we repeat there is no such language in this statute), the Constitution is a dead letter.

Whatever language the plaintiffs may use to describe this statute or its *modus operandi*, the cases hereinbefore cited show that the courts in passing upon the constitutionality of a statute look at its effect. If the effect of the statute (which in this case is private price-fixing with respect to all ordinary commodities) is to transgress the Constitution, the statute is invalid, no matter how it is described, and no limitation of property can be implied by reason of an unconstitutional statute.

(5) The constitutionality of the statute cannot be sustained by denominating the imposed price restrictions as "equitable servitudes."

The plaintiffs do not, and in view of the language of the statute and the admitted allegations of the pleadings cannot, claim that there is any equitable servitude on the merchandise which the defendant offers for sale. The defendant's goods were never subject to any price restriction unless such restriction is imposed by the statute here under attack. The statute, by its terms, purports to impose a restriction on defendant's goods regardless of any restriction imposed thereon by any contract covering them. The statute says that although the goods were never subject to a price-fixing contract, the mere fact that the plaintiffs made a contract between themselves, covering other goods bearing a like mark, requires the defendant, who has signed no contract, to be bound by the terms of a contract between other persons.

The law concerning equitable servitudes on chattels is well set forth in *Garst* v. *Hall & Lyons Co.*, 179 Mass. 588,

61 N. E. 219. There it was held that a manufacturer of medicine, who invariably sold his product under a contract whereby his vendee agrees not to resell for less than the fixed price, could not enjoin one who subsequently bought from such vendee from selling below the fixed price. The Court, per Mr. Justice Knowlton, said (61 N. E. 219, 220):

> "The transactions between the plaintiff and his vendee set out in the bill plainly are sales which pass the title to the property. It is equally, or perhaps more, plain that the contract contemplated sales by retailers, which shall pass an absolute title to the property. The purchaser from a purchaser has an absolute right to dispose of the property. He may consume it, or sell it to another. The plaintiff has contracts from his vendees in regard to the prices at which they will sell if they sell at all. If they sell in violation of their contracts with the plaintiff, he has a remedy against them to recover his damages. *Garst* v. *Harris*, 177 Mass. 72, 58 N. E. 174. This right is founded on the personal contract alone, and it can be enforced only against the contracting party. To say that this contract is attached to the property, and follows it through successive sales which severally pass title, is a very different proposition. We know of no authority, nor of any sound principle, which will justify us in so holding. The plaintiff's trade-mark does not give him the rights of a patentee in property manufactured under a patent. His trade-mark is to secure him and the public from deception and fraud as to the origin and source of these goods and of similar goods sold in the market. The law of copyright also gives privileges to authors and publishers that do not pertain to property which anybody may make and sell if he can; but, even under the law of copyright, when the owner of a copyright and of a particular copy of a book to which it pertains has parted with all his title to the book, and has conferred an absolute title to it upon a purchaser, he cannot restrict the right of alienation, which is one of the incidents of ownership in personal property. *Harrison* v. *Maynard, Merrill & Co.*, 10 C. C. A. 17, 61 Fed. 689. See, also, *Clemmens* v. *Estes*, (C. C.) 22 Fed. 899; *Meyer* v. *Estes*, 164

Mass. 457, 41 N. E. 683, 32 L. R. A. 283; *Waterman Co.* v. *Waterman*, 27 App. Div. 133, 50 N. Y. Supp. 131. In the present case there was not only no contract between the plaintiff and the defendant, as in *Fowle* v. *Park*, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67, but there is no averment or proof that the defendant fraudulently induced and procured the breach of a contract between the plaintiff and any of his vendees, to the detriment of the plaintiff, as did the defendant in *Exchange Tel. Co.* v. *Central News*, (1897) 2 Ch. 48, and in *Standard American Pub. Co.* v. *Methodist Book Concern*, 33 App. Div. 409, 54 N. Y. Supp. 55."

Similarly, Judge Lurton (later of the United States Supreme Court) said in *Park & Sons Co.* v. *Hartman*, 153 Fed. 24, 39:

"General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. 'If a man,' says Lord Coke, in Coke on Littleton, sec. 360, 'be possessed of a horse or any other chattel real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him so as he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man.' It is also a general rule of the common law that a contract restricting the use or controlling subsales cannot be annexed to a chattel so as to follow the article and obligate the subpurchaser by operation of notice. A covenant which may be valid and run with land will not run with or attach itself to a mere chattel (citing cases). Against this conclusion, and in supposed opposition to the above authorities, counsel for the appellee have cited the line of cases heretofore referred to relating to contracts restraining the use or sale of articles made under patents or copyrights. We have already indicated herein that these cases do not apply to contracts which do not relate to articles not made under patents or copyrights."

Hence we may say with assurance that there is no merit in any claim that the cases dealing with equitable servitudes on chattels demonstrate by analogy the reasonableness of this statute.

(6) The constitutionality of the statute cannot be sustained by the argument that it merely gives a cause of action against persons inducing breach of contract.

There is no charge here that the defendant has made any effort to induce a breach or to interfere with any contract. Indeed, it is not claimed that any act of the defendant is apt to cause a retailer or distributor to break its contract with the plaintiff.

Defendant is merely selling its own goods at prices lower than those agreed upon by the plaintiff and others in a contract wholly between themselves.

The doctrine of *Lumley* v. *Gye*, 2 El. & Bl. 216, has never been extended to protect contracts against the incidental economic effects of another's exercising his own rights in a lawful way.

Surely a landlord would have no cause of action against those who compete with his tenant merely because incidental to such competition the tenant might not make enough money to pay his rent. Such is the extension of law which the plaintiffs would have to urge.

The law with respect to inducing breach of contract stops far short of where the plaintiffs would have it.

Lamport v. *4175 Broadway, Inc.*, 6 Fed. Supp. 923;
Sweeney v. *Smith*, 167 Fed. 385, aff'd 171 Fed. 645, cert. denied, 215 U. S. 600.

(7) The constitutionality of the statute cannot be sustained on the theory that the statute is reasonable because it gives a cause of action only to a "person damaged."

This argument begs the question before the Court, for there is no legal damage unless the statute is constitutional.

There can be no legal damage without the violation of a legal right. (1 Sutherland, Damages, 4th Ed., Sec. 2.) If one suffers injury from acts which are not legally culpable, the injury is *damnum absque injuria.* (1 Sutherland, Damages, 4th Ed., Sec. 3.)

Here the plaintiffs' claim of damage is dependent upon a statutory right. If the basic statute is unconstitutional, there is no right in the plaintiffs, and they have sustained no legal damage.

In *Buchanan* v. *Warley,* 245 U. S. 60, the Court held unconstitutional a statute forbidding sales of real property to negroes under certain circumstances. The statute was enacted for the purpose, among others, of protecting real estate values of adjoining land owned by white people. Could anyone assert that one property owner suffered legal damage because another sold his land to a negro, even though the sale in fact caused depreciation of property values?

An unconstitutional statute cannot be made constitutional by limiting its enforcement to causes of action in favor of persons who may suffer monetary loss from its violation. Before injury or damage must come right.

If the legislature regarded distribution by chain stores as the only desirable method of retailing, and accordingly passed a statute declaring retailing by others than chain stores to be unfair competition actionable at the suit of any chain store damaged thereby, the statute would be as unconstitutional as if it made the proscribed retailing a crime.

C. If it be assumed contrary to fact, that the prevention of unfair competition is the purpose of the statute, the means of preventing such practices are wholly irrelevant to the purpose.

Merely selling below a price dictated by another does not involve any passing off, any counterfeiting, any slander of goods or of persons, any fraud on the public or any dishonesty. The statute says in effect that no retailer can sell his own goods at his own price if they bear the producer's mark or name although the goods are genuine, although no customer is deceived and although the retailer's price is dictated by fair competition with other retailers and even yields him a substantial profit. This statute seeks not to eliminate unfair competition, but to prohibit all competition in the retail field with respect to such commodities (cf. *People ex rel. Moskowitz* v. *Jenkins*, 202 N. Y. 53, discussed *supra*, pp. 52, 53).

It is wholly immaterial that the legislature has declared that selling one's own property below the price arbitrarily dictated by another is "unfair competition." Selling one's own goods below a price fixed by a manufacturer or a wholesaler is not unfair competition and no legislative declaration can, with due regard to the Constitution, make it unfair competition.

The legislative purpose and the means adopted by the legislature to achieve that purpose are always subject to judicial scrutiny. If the purpose be not a valid one and if the means adopted to achieve the purpose are unreasonable, arbitrary or discriminatory, or if they are irrelevant to a proper constitutional purpose, the courts may so declare, whatever language the legislature may have used.

See:

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522, 536.

Home Building & Loan Association v. *Blaisdell*, 290 U. S. 398, 442.

Not infrequently have legislatures sought to justify price regulation of ordinary commodities by declaring that such regulation was a means of achieving a valid constitutional purpose. Time and again the courts have looked through the legislative declaration and have held that the legislature could not by this method fix the price of ordinary commodities and thus deprive citizens of their constitutional rights of liberty and property.

In *Williams* v. *Standard Oil*, 278 U. S. 235, the Court held unconstitutional a State statute attempting to fix the price of gasoline, although the legislature declared that the regulation was to prevent unfair and improper trade practices and that the gasoline business was affected with a public interest.

Again, in *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, the Court held unconstitutional a State statute attempting to make the price of dairy products as fixed by a single transaction the uniform price throughout the State, although the legislature declared that the regulation was for the purpose of preserving free competition.

In *People* v. *Gillson*, 109 N. Y. 389, the proponents of the legislation there challenged sought to support it as a means of preventing fraud and adulteration of food, and argued that no one could sell an article for less than his competitors and at the same time deal honestly. The Court, while recognizing that the legislature had power to prohibit the adulteration of food, rejected the argument and condemned the statute as unconstitutional. The Court pointed out that giving gifts or selling for less than competitors is not dishonest and "may simply be the old story of a small profit on large sales instead of a large profit on small sales." The Court likewise noted that the effect of the statute was not to preserve fair competition, but to eliminate competition and destroy constitutional rights.

Similarly, the courts have condemned price-fixing statutes, although the legislature has declared that the business sought to be regulated was affected with a public interest.

See:

New State Ice Co. v. *Liebmann*, 285 U. S. 262;
Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522;
Tyson v. *Banton*, 273 U. S. 418.

The price of theater tickets cannot be regulated by a legislative declaration that a theater is a railroad or a public utility. The right of a person to sell ordinary commodities which he owns at his own prices cannot be curtailed by calling such a sale unfair competition.

The Federal courts, in applying the Federal anti-trust laws, have held in numerous cases that agreements and combinations whereby manufacturers fix resale prices are illegal and even criminal restraints of trade, and are inimical to free and fair competition. The Federal Trade Commission, an administrative body charged by law with the duty of preventing "unfair methods of competition," has time and again prosecuted people for maintaining resale prices. Among the numerous Federal cases heretofore cited are *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373; *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8; *Federal Trade Commission* v. *Beechnut Packing Co.*, 257 U. S. 441; *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490.

Are we to say that the mere legislative declaration that competition (although of a type required by Federal law and recognized by all standards as proper and desirable) is "unfair", is sufficient to abrogate the constitutional guarantees against deprivation of liberty and property, without due process of law?

The opinion of the Chief Justice in the Schechter case on this precise point is an emphatic negative (79 L. Ed. 888, at pp. 895-899).

Even if this statute were aimed at the prohibition of sales below cost (which it is not), such sales cannot properly be held to constitute unfair competition.

Sears, Roebuck Co. v. *Federal Trade Commission*, 258 Fed. 307.

Sinclair Refining Co. v. *Federal Trade Commission*, 276 Fed. 686, aff'd 261 U. S. 463.

S. S. Kresge Co. v. *Champion Spark Plug Co.*, 3 Fed. (2d) 415.

In the Sears, Roebuck case (*supra*), the court said, page 312:

> "We find in the statute no intent on the part of Congress, even if it has the power, to restrain an owner of property from selling it at any price that is acceptable to him or from giving it away."

The Brookings Institution Survey comments adversely on NRA codes which contained general provisions against sales below cost, stating:

> "It is a well-known business fact, however, that there are conditions in which business men find it profitable for a time to sell below their costs—even their direct costs—even though they have no hope of thereby attaining a monopoly position. During periods of depression, for example, nothing is more common than business men selling below cost 'to stay in the business picture.' Far from hoping to attain a monopoly, they hope merely to stay alive."

The effect of this statute is to strike down all price competition in a particular commodity between retailers if a manufacturer so decrees. It forbids honest dealing and the honest use of one's own property. It has no relation to anything which has ever been understood to be embraced

within the meaning of the term "unfair competition." As the cases hereinbefore cited show, the legislature cannot enlarge its own power so as to deprive citizens of liberty and property without due process of law by the use of an epithet.

To summarize:

A. Plaintiffs' cause of action is based entirely upon Section 2 of the statute.

B. Section 2 of the Act provides that a man may not sell his own property for less than the price fixed by other private persons in their absolute and unlimited discretion. Those persons are given power without limitation and without any supervision or restraint imposed by the State to fix the price at which other people may sell their own property. The power may be exercised over most of the commodities that people own and use and may be exercised arbitrarily, capriciously or maliciously.

C. We submit that Section 2 is unconstitntional as depriving retailers of liberty and property without due process of law.

(1) because the legislature is without constitutional power to enact a general price-fixing statute applicable to all commodities and all business, and

(2) because the challenged statute is arbitrary, discriminatory and irrelevant to any valid legislative purpose.

D. Insofar as it applies to retailers who have not signed price maintenance agreements, the statute cannot be sustained. It is arbitrary and discriminatory:

First. No official state body is set up to fix prices. It is left to private individuals, producers, to determine, firstly, whether prices should be fixed, and, secondly, at what level. No outsider, who may be ultimately bound by the determination, is permitted an opportunity to be heard

on either question. The retailer, who is going to be restricted in the conduct of his own business by the conclusion reached, is not allowed to present his views as to the reasonableness of the price, or, indeed, as to the necessity for fixing any price. The consumer, who must bear the burden of the increased price, has no opportunity to be heard before the prices are fixed. No machinery is provided for judicial or administrative review of any of the acts of producers and retailers in fixing prices.

Second. Before prices are fixed for any commodity, there is no finding by any legislative or administrative body that price fixing is necessary. That question is left to the individual whim of each producer.

Third. There is no standard set up for the contract to be entered into between producer and retailer, by virtue of which contract the conduct of all retailers are to be governed. The contract may be oral or in writing. There is no requirement that the contracts be uniform. There is no requirement that the prices be uniform among retailers. Various special privileges may be given in connection with the contracts to some retailers, and not to others.

Fourth. There is no standard set up, which is adjustable to particular conditions in given localities. So far as the statute is concerned, if the operator of a large department store in Chicago knows of a contract made by the plaintiff with a small merchant in a rural community in the far western part of the state, the Chicago department store merchant must comply with the price fixed by the producer in its contract with the rural merchant.

Fifth. No standard is set up to guide non-contracting retailers as to which contract they are to be bound by. So far as the statute prescribes, the producer may have many different forms of contract. He may make changes in these contracts. In fact the contract annexed to the complaint

herein, permits the producer "from time to time in its sole discretion to revise such minimum resale prices and provides that such revised resale prices shall become effective at such time as specified by plaintiff." The burden is placed upon each non-contracting retailer to select which of the various forms of contract he is to follow. Is he to be guided by the most favorable form offered to any retailer? The statute merely says: "any contract." And there is no assurance that if he selects one, the producer may not complain that he should have selected another. Non-contracting retailers must, at their peril, follow all price changes, although there is no requirement that notice thereof be given to them.

Sixth. There is no standard set up as to the method of fixing prices. Once a producer determines in his own discretion, untrammeled by any official finding of necessity, or by any public convenience to be served, that prices should be fixed, the amount of the price is in the uncontrolled will of the producer. He may be guided by mistake, ignorance or malice. The price fixed by him may be wholly unreasonable and unfair. It may provide an exorbitant profit to himself and a small profit to the retailer. It may be so unreasonable that few, if any, retailers would be willing to abide by it. Yet, according to the statute, if he succeeds in making a contract with one retailer; all other retailers in the state are bound thereto.

Seventh. The statute sets up no reasonable standard between practices which are honest and fair and those which are dishonest and unfair. There is no statement of any statutory policy making such distinction; nor is the statute directed exclusively toward unfair or predatory conduct. Even though a retailer charge a fair price for his commodity involving a fair profit to himself, he may still be enjoined or mulcted in damages merely because the

price he charges is not as exorbitant as the producer desires it to be.

Eighth. The statute furnishes no standard for its enforcement. No state officer or agency is created for the purposes of enforcing it. No governmental body has the responsibility of compelling compliance. Indeed, there is no legislative determination as to when and where enforcement shall be attempted at all. The matter is left to the producer. It is difficult to see how anyone else would come within the class set up in section 2 of the statute—"any person damaged thereby." It lies within his discretion to enforce, or not to enforce, his agreements against any retailer, contracting or non-contracting. He may decide to compel obedience by one retailer and shut his eyes to violations by competitors of such retailer. It is obvious that there is thus deposited in the hands of a producer the power to drive one retailer from business in his commodities, and leave unmolested another retailer who violates the same fixed prices. Non-compliance with the statute is not made a crime: the state can in no way become a party to the enforcement process. It is left wholly to the whims and caprice of each producer. And even if the statute gives the power to other parties who may be "damaged thereby" the same arbitrary and discriminatory exercise of it is made possible.

Nor can it be said within the principle of *Nebbia* v. *New York*, 291 U. S. 502, that the provisions of the statute are wholly relevant to the policy of it and to the abuses which it was designed to abolish. If the statute was aimed at "loss leaders" its terms do not so indicate. A retailer may, indeed, be selling at a fair profit and yet violate the statute, if he sells it for one cent below the price fixed by the producer.

If the purpose of the statute was to prevent "predatory

price cutting," and if we assume that that phrase means price cutting with an intent to injure competitors, the statute is not restricted by its terms or by fair interpretation to the eradication of that evil. The law applies to all retailers, irrespective of their motive or intent in selling their own property at lower prices. Without regard to the effect upon competitors, the retailer by this statute is compelled to charge his customers a higher price that might afford him a reasonable profit, even though his class of customers might not be willing to pay such price.

The importance of the motive in price cutting and price discrimination is illustrated by the two cases of *Fairmont Creamery Co.* v. *Minnesota*, (274 U. S. 1) and *Central Lumber Co.* v. *South Dakota*, (226 U. S. 157). In the latter case this Court declared constitutional a South Dakota statute which prohibited price discrimination "for the purpose of destroying the competition of any regular established dealer in such commodity, or to prevent competition of any person who, in good faith, intends and attempts to become such dealer." In the former case, however, this Court declared unconstitutional a Minnesota statute which prohibited price discriminations without regard to the motives behind them.

The absence of fair standards in this statute, and the controlling effect of the whim of a producer over the business of others, render the statute unconstitutional as arbitrary, discriminatory and unreasonable.

CONCLUSION.

The decision here involved is of tremendous importance not only to the (defendants) appellants in this case, but also to the consuming public who are not here represented. The case is of no less importance to the people at large perhaps, second only to the recent case of *Schechter Poultry Corporation* v. *U. S.*, 295 U. S. 495, where this Court passed upon the validity of an act of Congress seeking to control and fix prices in businesses and industries throughout the country by codes, which in effect is the identical thing which the "Fair Trade Act" seeks to accomplish in Illinois for business, and contrary to constitutional authority.

Where does this extraordinary power over business operations begin, and where may it be said to end? When, if ever, did the legislature acquire the alleged right to legislate that a person may not sell or dispose of his own property at such prices, and in such manner as he may lawfully do under the safeguards provided by the fundamental Laws of the Land? Have the constitutional guaranties become nullities and ceased to operate upon the legislature? These and many other important questions are definitely involved in this case.

The answer to each of the questions is obvious—no such rights exist in the legislature, and the Constitution of the United States is still the Supreme Law of the Land.

We submit we have conclusively shown that the legislature exceeded its constitutional powers in enacting the Illinois Fair Trade Act.

We submit no substitute has yet been discovered for the old tried law of economics that prices are naturally fixed by supply and demand.

If the effort manifested by the legislative enactment of the Fair Trade Act, and the issuance of this injunction by the Court to regulate private business and conduct by fixation of prices, which cannot conceivably be constituted a public use or vested with a public interest, be sustained, then the extension of similar laws and injunctions to every trade and every occupation to illimitable bounds can reasonably be expected.

A statute imposing privately made contracts upon nonconsenting persons, without uniformity of regulation, price, region or motive, and without confinement to predatory price cutting is invalid.

Irrespective of the theory that economic and legal orders are inseparably fused, and the so-called fundamental necessities of the socio-economic society, obvious rules of interpretation of constitutional provisions tie the hands of the Court until and unless basic changes are made in the existing positive law. The history of price fixing from the economist's viewpoint is, like the pathway of science, strewn with wrecked hypotheses.

The extraordinary feature of the present resale price-fixing provisions of the Fair Trade Act and this injunction, that place an ordinary individual in contempt of Court, with a drastic remedy of fine or imprisonment, all because a small retail storekeeper insists upon his property rights for the sale of his goods and wares at a price satisfactory to himself and his customers, is a most unreasonable and oppressive deprivation of the inherent rights of an individual. The Federal Constitution is not a thing to be extolled merely in academic halls, or to be the subject of juvenile orations, but is vibrant and designed to safeguard not only life and liberty, but also property rights in time of stress and suffering, when despairing and des-

perate majorities seek by forbidden methods the subversion of fundamental principles of government.

We submit that the decision of the Illinois Supreme Court affirming the decree granting the injunction is in error and should be reversed and the injunction dissolved.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 226

OLD DEARBORN DISTRIBUTING COMPANY,
Appellant,

vs.

SEAGRAM-DISTILLERS CORPORATION,
Appellee.

APPELLEE'S BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 226

OLD DEARBORN DISTRIBUTING COMPANY,
Appellant,

vs.

SEAGRAM-DISTILLERS CORPORATION,
Appellee.

APPELLEE'S BRIEF.

This appeal attacks the constitutionality of Section 2 of the Illinois Fair Trade Act on the grounds that it deprived the defendant* of its liberty and property without due process of law and denied it the equal protection of the laws in violation of the Fourteenth Amendment. The judgment of the Supreme Court of Illinois appealed from, (363 Ill. 610, R. 105) affirmed a decree permanently enjoining defendant from wilfully and knowingly advertising, offering for sale or selling certain whiskies below the prices stipulated by plaintiff in accordance with contracts executed pursuant to the Illinois Fair Trade Act. (R. 13). The court had previously disposed of certain contentions made against the validity of the Act in *Triner Corporation* v. *McNeil,* 363 Ill. 559 (R. 86).

* For the convenience of the Court, the parties will be referred to as plaintiff and defendant.

Statute Involved.

The Illinois Fair Trade Act (Laws of Illinois 1935, p. 1436, Ill. State Bar Stats. 1935, Ch. 140, Par. 8, effective July 8, 1935), is as follows:

AN ACT to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

SECTION 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: *Provided, however,* that such stock is first offered to the manufacturer of such stock at the origi-

nal invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

SECTION 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

SECTION 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

SECTION 4. This Act may be known and cited as the "Fair Trade Act."

Statement of the case.

Plaintiff, a Delaware corporation, is in the business of buying and selling solely at wholesale, alcoholic beverages which it does not manufacture but buys from the producers, Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc., and affiliated corporations (R. 37). These beverages are of standard quality and are in free and open competition with commodities of the same general class which are produced by others and which are sold and distributed in Illinois, and they are sold by plaintiff under the trade-marks, brands and names of the producers. Plaintiff does not sell to retailers but all of its sales are confined to wholesale distributors (R. 34, 35). Plaintiff has never sold any of the products in controversy to the defendant but has sold other liquors

to it as a wholesaler (R. 36-39). Plaintiff has expended large sums of money in building up its good will and in advertising these products in Illinois (R. 35). Defendant is an Illinois corporation operating four retail liquor stores in Chicago and is also engaged in the wholesale liquor business (R. 36, 39).

Shortly after July 8, 1935, (the effective date of the Illinois Fair Trade Act), the plaintiff formulated and established a system of resale price maintenance under the Act. Before the middle of October, 1935, plaintiff entered into Fair Trade contracts with all of the Illinois distributors to whom it was then selling Seagram products at wholesale, and also executed Fair Trade contracts with numerous Illinois retailers although it has not sold and does not sell said beverages to any retailer (R. 36). One of such retailers' contracts was executed by plaintiff and signed by defendant's secretary and treasurer on August 14, 1935 (R. 46-47). This officer was also a director of the defendant and "had full charge" of defendant's purchases (R. 54).

Both the distributors' (R. 17) and the retailers' (R. 15) contracts contain provisions that said products shall not be sold, advertised or offered for sale in Illinois below the prices to be stipulated by plaintiff. The retailers' contracts recite that plaintiff has executed contracts with its distributors, wherein the distributors "have agreed not to sell within the State of Illinois any of said beverages to any Retailer in Illinois unless and until said Retailer shall have executed a contract similar to this contract". They further recite that it is the desire of plaintiff and the retailer "to fix the resale prices of said beverages, both at wholesale and at retail, within the limits of the Fair Trade Act of Illi-

nois, for the purpose of insuring a fair return to those engaged in the sale thereof." The parties in the retailers' contracts agree that "the minimum sales prices of such beverages by Retailer to Consumers will be in accordance with written schedules thereof, furnished from time to time to Retailer by Owner (the plaintiff), or distributor of Owner, which schedules are to be considered a part of this contract." The plaintiff entered into additional Fair Trade contracts after the execution of the contract with defendant on August 14, 1935 (R. 68). Since the middle of October, 1935, all of the said beverages which plaintiff has sold in Illinois have been subject to one or more of these Fair Trade contracts (R. 36).

Plaintiff distributed written schedules (R. 22A) of its minimum prices to its distributors and to the retailers who executed Fair Trade contracts. The defendant received one of them before November 16, 1935, accompanied by a written demand, dated November 5, 1935, to comply with plaintiff's Fair Trade contracts (R. 44, 68).

Defendant admits in its answer that on the 13th, 15th and 16th of November, 1935, it advertised, offered for sale and sold certain of said Seagram products at retail below said minimum prices (R. 8). On November 16, 1935, when two of plaintiff's representatives again demanded of defendant that it comply with its Fair Trade contract and with plaintiff's other Fair Trade contracts, and delivered to it additional copies of plaintiff's schedule and written demand of November 5, 1935, defendant advised plaintiff that the defendant would not comply with said contracts. Defendant then threatened that it would,

and on November 18, 1935, it did, and thereafter it continued to wilfully and knowingly advertise, offer for sale and sell said beverages at prices below those stipulated by plaintiff, in violation of its Fair Trade contract with plaintiff and plaintiff's other Fair Trade contracts provided for in defendant's contract (R. 43, 67). The beverages which defendant acquired from distributors who had signed Fair Trade contracts with plaintiff were purchased by defendant at prices below the minimum wholesale prices stipulated in plaintiff's schedule in violation of the contracts of said distributors, and defendant was a party to breaches of said contracts (R. 51, 54, 106).

On November 19, 1935, plaintiff notified defendant that the verified complaint herein (R. 1) had been filed, and on November 20, 1935 plaintiff made a motion for a temporary injunction. Defendant refused to discontinue wilfully and knowingly violating said Fair Trade contracts (R. 23, 24). The trial court gave defendant leave to answer immediately and set the matter for the next day. On November 21, 1935 defendant filed its answer (R. 7) and a trial on the merits proceeded. Plaintiff's reply was filed on November 22 (R. 12). The defendant continued throughout the trial, which lasted until November 30, 1935, to wilfully and knowingly violate said Fair Trade contracts (R. 69). Defendant publicized its price cutting by pasting advertising posters on the window of its store at 208 West Madison Street, R. 69) and by advertising in the daily press (R. 70A).

The defendant's price cutting resulted directly in consumers questioning the quality of Seagram products (R. 40), in numerous retailers threatening to discontinue dealing in said beverages if defendant

continued cutting prices (R. 71), in retailers dealing in Seagram products concealing the same from customers (R. 48), in retailers cutting prices on Seagram products in order to meet defendant's prices (R. 36, 48-51), and in causing a practical stoppage of plaintiff's sales and a complete demoralization of plaintiff's distribution of Seagram products in Chicago (R. 40, 77-85).

Appellee's (Plaintiff's) contentions.

Plaintiff contended in the trial court and in the Supreme Court of Illinois that the August 14, 1935 Fair Trade contract between plaintiff and defendant was valid and binding on defendant; that it was executed in accordance with Section 1 of the Illinois Fair Trade Act, a distinct and separable portion of the statute which can be applied wholly independently of Section 2; that Section 1 of said Act was unquestionably constitutional; and that plaintiff was entitled to the injunction because of the irreparable injury which it was suffering on account of defendant's continuing violations of its contract; and plaintiff further contended that Section 2 of the Act was constitutional as applied to the facts in this case, and that it was entitled to the injunction irrespective of the validity of defendant's contract of August 14, 1935.

The Supreme Court of Illinois did not find it necessary to pass on plaintiff's contentions that it had a valid and binding contract with the defendant under Section 1 of the Act * notwithstanding defend-

* It should be noted, however, that the Supreme Court of Illinois in the present case recognized that resale price maintenance contracts were valid as between the parties thereto even prior to the enactment of the Fair Trade Act (363 Ill. 610, R. 108). See also *Triner Corporation* v. *McNeil*, 363 Ill. 559, 580 (R. 103).

ant's claim that it was improperly executed and lacking in mutuality, and that the plaintiff was entitled to equitable relief regardless of the validity of Section 2 of the Act. These contentions, upon which the Supreme Court of Illinois failed to pass, involved, as is apparent, questions which are non-federal in their nature and which, under the decisions of this Court, cannot be decided on this appeal. Plaintiff's argument on this appeal is therefore restricted to the contention that Section 2 of the Fair Trade Act is constitutional as applied to the facts in this case and any decision on this appeal, if adverse to the plaintiff, must necessarily be without prejudice to the plaintiff's right to urge in subsequent proceedings in support of the trial court's decree the contentions upon which the Supreme Court of Illinois failed to pass.

SUMMARY OF ARGUMENT.

I.

The Illinois Fair Trade Act which is substantially identical with Fair Trade acts adopted in thirteen other states, provides for the use of resale price maintenance contracts for the purpose of protecting trade-mark owners, distributors and the public against the harmful results of price-cutting of articles of standard quality which are in free and open competition with other commodities of the same general class, and are sold under a trade-mark, brand or name. Whether price cutting is an economic evil which should be controlled by resale price maintenance contracts is a controversial economic question. The Illinois legislature has finally resolved the controversy in that state by sanctioning the use of such contracts, and its judgment upon this subject is conclusive.

II.

Defendant cannot base its attack upon the constitutionality of the Act upon imaginary and hypothetical situations, but is limited in its attack to the facts in this case.

The authorities relied upon by defendant to the effect that price-fixing of commodities is unconstitutional are inapplicable. Defendant's further contention that the Act is a delegation of legislative authority is without merit.

The Fair Trade contracts to which Seagram

products have been and are subjected, impose equitable servitudes, upon the use of the Seagram name in connection with the sale of Seagram products as provided for by the Fair Trade Act. Since defendant acquired the goods in question subject to such restrictions, defendant cannot complain that it is deprived of liberty or property. The courts, in analogous situations, have enforced restrictions against persons acquiring property with notice thereof. The Fair Trade Act, in so providing, is clearly constitutional.

Defendant can claim no violation of the due process clause because of any change which the Act may have made in the pre-existing law, or because the Act imposes new liabilities. The principles applied in the numerous decisions of this court sustaining the validity of statutes involving the exercise of the police power and curtailing liberty and property rights to a greater extent than the defendant claims the Fair Trade Act interferes with its liberty of contract and property rights, support the validity of the Act. Defendant's argument that the Act is unconstitutional since it inures to the benefit of producers and distributors of articles bearing a trade-mark, brand or name, is without merit.

The only remedy provided for by the Act is judicial relief and in view of the fact that the relief provided for is similar to that granted by the courts even in the absence of statute, in cases enforcing equitable servitudes on property, in cases granting equitable relief against interference with contract relations, and in unfair competition cases, it is clear that the Act is not unreasonable or arbitrary and that it is reasonably designed to accomplish its purpose.

III.

Defendant can not in this case assail the validity of the Act as a violation of the equal protection clause because of any discrimination in favor of owners or distributors of articles under a trade-mark, brand or name, as against owners or distributors of articles not sold under such trade-mark, brand or name. The Act is available to all who choose to bring themselves within its scope, and the classification attacked is just and reasonable.

ARGUMENT.

I.

The purpose and nature of the Fair Trade Act.

The purpose of the Act as expressed in its title is "to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade-mark, brand or name." The Act recognizes that the trade-mark, brand or name under which an article is sold is a valuable property right.

The means adopted by the Act to accomplish such protection is to permit the use of resale price maintenance contracts in order to control the evils of price-cutting of such articles in the course of their distribution from the manufacturer or producer to the ultimate consumer. This type of resale price maintenance is commonly referred to as "vertical" —being confined to the maintenance of uniform selling prices for a particular commodity from the producer through the wholesaler and retailer to the consumer, and preventing a producer or manufacturer from being forced to compete with himself or his distributors in the sale of a particular commodity. The term "horizontal" resale price maintenance is commonly used to refer to price maintenance agreements between the sellers of rival commodities, whether they be producers, wholesalers or retailers, and such agreements are expressly prohibited by the Act.

Section 1 of the Fair Trade Act expressly legalizes "vertical" resale price maintenance contracts be-

tween the parties, with the proviso that such commodities may be sold free of any contractual restrictions prohibiting price-cutting if they are being closed out for the purpose of discontinuing delivery, if they are damaged or deteriorated in quality, and notice thereof is given to the public, or if they are sold by any officer acting under the orders of any court.

It was conceded in the cases involving the validity of Fair Trade Acts in other states that the section corresponding to Section 1 of the Illinois Act is constitutional and the courts which have decided that the section of the Act corresponding to Section 2 of the Illinois Act is unconstitutional under the facts in the cases before them have expressly recognized the validity of provisions similar to Section 1. *Doubleday, Doran & Co., Inc.* v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272, 199 N. E. 409, 411, 103 A. L. R. 1325 (1936); affirming 158 Misc. 267, 284 N. Y. S. 533 (1935); *Coty, Inc.* v. *Hearn Department Stores Inc.*, 158 Misc. 516, 284 N. Y. S. 909 (1935); See also opinions of dissenting judges in *Max Factor & Co.* v. *Kunsman*, 5 Cal. (2d) 446, 55 Pac. (2d) 177 (1936), and *Pyroil Sales Company, Inc.* v. *The Pep Boys, Inc.*, 5 Cal. (2d) 784, 55 Pac. (2d) 194 (1936).

Section 2 makes such contracts binding upon persons other than the parties thereto, upon the conditions prescribed in said section. Section 3 provides that the Act shall not legalize contracts for "horizontal" price maintenance as to competing articles.

The right to fix resale prices is limited and confined to commodities (1) of standard quality in fair and open competition with commodities of the same general class, produced by others; and (2) bearing and sold under, trade-marks, brands or names. These limitations insure the continuance of the operation

of normal laws of competition between rival articles and prevent the Act from being used as a means of creating or fostering monopolies.

The legislatures of many states have recognized the economic evils of price-cutting. The first statute of the type commonly designated as a "Fair Trade Act" was enacted in California in 1931,[1] and contained a provision substantially identical to Section 1 of the Illinois Fair Trade Act. Subsequently, in 1933, the California legislature amended this Fair Trade Act by adding a provision which is substantially identical with Section 2 of the Illinois Act. Substantially similar statutes have since been enacted in twelve other states.[2] This widespread adoption of the Act is indicative of the general recognition of the injurious effect of price-cutting, and is evidence of the reasonableness of the method invoked to curb it. *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 161 (1912).

Whether price cutting is an economic evil which should be controlled by resale price maintenance contracts is an economic question, *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8, 27, concurring opinion of Mr. Justice Brandeis (1918), *North-*

1. California—Chap. 278, Laws of 1931, amended by Chap. 260, Laws of 1933.
2. Iowa—S. B. 222, Laws of 1935.
Louisiana Act No. 13 Approved June 26, 1936.
Maryland—Chap. 212 Laws of 1935.
New Jersey—Chap. 58 Laws of 1935.
New York—Chap. 976, Laws of 1935.
Ohio—H. 609X approved April 7, 1936.
Oregon—Chap. 295, Laws of 1935.
Pennsylvania—Act No. 115, Acts of 1935.
Rhode Island—S. B. No. 180, approved May 5, 1936.
Virginia—S. B. No. 126, approved March 27, 1936.
Washington—Chap. 177, Laws of 1935.
Wisconsin—Chap. 52, Laws of 1935.

ern Securities Co. v. *United States,* 193 U. S. 197, 337 (1904). This question has been the subject-matter of economic controversy for many years and has on numerous occasions been brought to the attention of the courts.[1] In enacting the Fair Trade Act the Illinois legislature has finally resolved that controversy in Illinois by determining that price-cutting is an uneconomic and injurious practice and that the use of resale price maintenance contracts is a proper means of controlling it. We therefore refrain from a discussion of the many arguments for and against the use of resale price maintenance contracts as a means of controlling price-cutting since the judgment of the legislature upon this subject is conclusive. *Nebbia* v. *New York*, 291 U. S. 502, 537 (1934); *German Alliance Insurance Co.* v. *Kansas,* 233 U. S. 389, 413 (1914); *Tanner* v. *Little,* 240 U. S. 369, 385 (1916). It is to be observed that the federal cases holding resale price maintenance contracts invalid in the absence of statute, recognized that the evil of price-cutting was one which could be controlled by legislation. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U. S. 373, 405 (1911); *Boston Store* v. *American Graphophone Co.,* 246 U. S. 8, 26 (1918); *Bobbs-Merrill Co.* v. *Straus,* 210 U. S. 339, 350 (1908); *Bauer* v. *O'Donnell,* 229 U. S. 1, 12 (1913); *John D. Park & Sons Co.* v. *Hartman,* 153 Fed. 24, 46 (C. C. A. 6, 1907).

1. See references to literature on the subject. Appendix, p. 35, *infra.*

II.

The Illinois Fair Trade Act does not violate the due process clause of the Fourteenth Amendment.

1. The constitutionality of the Act is to be tested by the facts in the case and not by imaginary and hypothetical situations assumed by the defendant.

Defendant claims that the operation and effect of the statute is arbitrary, unreasonable and capricious and has resulted in a deprivation of the defendant's liberty and property. The defendant cannot base its attack upon the constitutionality of the Act upon imaginary and hypothetical situations. A statute may be invalid as applied to one set of facts, yet valid as applied to another, and defendant is limited in its attack to the facts in this case. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 289 (1921); *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 186 (1932); *Nashville C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 415 (1935); *New York ex rel Hatch* v. *Reardon*, 204 U. S. 152, 160 (1907); *Chicago Terre Haute & S. E. Ry. Co.* v. *Anderson*, 242 U. S. 283, 287 (1916); *Gorieb* v. *Fox*, 274 U. S. 603, 606 (1927); *Liberty Warehouse Co.* v. *Burley Tobacco Growers etc. Association*, 276 U. S. 71, 88 (1928).

At the outset we wish to stress the exact nature of the objections to the constitutionality of the Act to which the defendant is limited under the facts in this case. The defendant is free to cut prices on any Seagram products it may deal in, providing the Seagram name is not used in connection with their resale. The only liberty or property right of which the defendant can claim that it is deprived, is the

right to arbitrarily insist that it be permitted to continue to deal in Seagram products in an unlimited and unrestricted manner subsequent to the time when the plaintiff refuses to sell such products free of restrictions, regardless of any injury to the Seagram name and consequent injury to the plaintiff because of its interest in said name. Stated in another way, the defendant contends that it has an inherent right to deal in Seagram products free of all restrictions and that this right forbids the enactment of legislation permitting the plaintiff to impose binding restrictions on the products which it offers for sale.

2. The Act is not a "price-fixing" statute and does not delegate legislative power.

Defendant argues at great length that the Act is violative of the due process clause, citing authorities holding that price-fixing statutes are unconstitutional and also endeavors to distinguish *Nebbia* v. *New York*, 291 U. S. 502 (1934), which apparently departs from the principles enunciated in the decisions relied upon by defendant. Although we rely on certain of the general principles of constitutional law therein stated by Mr. Justice Roberts, we do not urge the actual holding in the *Nebbia* case as an authority for the constitutionality of the Fair Trade Act, as it is our contention that the statute before this court is not a price-fixing statute within the meaning of the foregoing decisions. The purpose of the statute is not price-fixing but it is designed to protect distributors and the public from the harm resulting from injurious practices in connection with the sale of articles under trade-marks, names and brands. The fundamental distinction

between the Fair Trade Act and the statutes involved in *Tyson* v. *Banton*, 273 U. S. 418 (1927); *Ribnik* v. *McBride*, 277 U. S. 350 (1928); *Williams* v. *Standard Oil Co.*, 278 U. S. 235 (1929), and the other so-called "price-fixing" cases is that the Fair Trade Act does not involve any governmental regulation of prices according to some artificial standard without regard to market factors, but on the contrary guarantees that normal competitive factors will remain operative. Seligman & Love, *Price Cutting and Price Maintenance* (1932) pp. 32, 33; 22 Virginia Law Review (1936), pp. 556, 560; 30 Illinois Law Review 638, 645-6 (1936); 36 Columbia Law Review 293, 301, footnote 42 (1936); 45 Yale Law Journal 672, 677-678 (1936); 13 New York University Law Quarterly Review 267, 278 (1936). The case of *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, (1927) relied on and referred to so frequently by defendant, is readily distinguishable from this case. The statute there involved, was designed to prevent the destruction of competition by overbidding and made it a crime for one purchasing dairy products to pay a higher price in one locality than he paid in another, completely disregarding any and all differences in competitive market conditions in the two localities, with the exception of differentials in the cost of transportation. In holding the statute invalid the court emphasized the fact that it disregarded "ordinary trade conditions."

Nor does the Fair Trade Act delegate legislative power. It was a complete statute at the time it was enacted, and was not in any way dependent upon the approval or disapproval of any individual. As in the case of many other statutes, however, it is conditional legislation which becomes operative and effective only

when the conditions therein prescribed are complied with. *Commonwealth* v. *Goldburg,* 167 Ky. 96, 180 S. W. 68 (1915); *Southern Pac. Co.* v. *U. S.,* 171 Fed. 360 (C. C. A. 9th, 1909); *United States* v. *Oregon R. & N. Co.,* 163 Fed. 642 (C. C. D. Oregon, 1908); *Samuelson* v. *State,* 116 Tenn. 470, 95 S. W. 1012 (1906); *In re Application of Thirty-Fourth Street Railroad Company,* 102 N. Y. 343, 7 N. E. 172, 176 (1886). Owners or distributors of articles covered by the Act are not required to operate under it. Retailers are not compelled to deal in articles which are subjected to contracts entered into pursuant to the Act. They can deal in such articles free of any restrictions if they do not make use of the trade-mark, brand or name in connection with their resale. The Act does not provide that "One set of owners determine not only the extent of use, but the kind of use which another set of owners may make of their property" as in *Eubank* v. *Richmond,* 226 U. S. 137 (1912) and *Washington* v. *Roberge,* 278 U. S. 116 (1927), relied on by defendant, but merely permits persons to impose restrictions upon the use of names under which articles are sold so that purchasers acquire only a limited right to the use of such names.

3. The Act does not deprive defendant of its liberty or property.

The testimony shows that plaintiff sells the products in controversy in the State of Illinois solely through its wholesale distributors, and that all of these distributors have signed Fair Trade contracts with the plaintiff (R. 36); that the validity of these distributors' contracts is undisputed; that on or before August 14, 1935, the date defendant signed its

contract with plaintiff (R. 46), it had full knowledge of plaintiff's system of distribution, including the nature and provisions of plaintiff's contracts with its distributors and retailers; that defendant knew when it purchased the Seagram products which it dealt in, that they were sold by wholesale distributors who had executed plaintiff's Fair Trade contracts (R. 51, 52). Furthermore, the defendant, in order to attempt to prove that it was not selling Seagram products below cost,* disclosed its participation with certain of plaintiff's distributors in breaches of their distributors' contracts with plaintiff, by showing that it purchased such merchandise from them at prices lower than plaintiff's stipulated wholesale prices (R. 54, 106). It is therefore clear that the Seagram products which the defendant dealt in had been specifically subjected to the express restrictions specified in said Fair Trade contracts.

Under the facts in this case it is clear that plaintiff's contracts with its distributors and with retailers, created and constituted "equitable servitudes" upon the use of the Seagram names, brands and trade marks, in connection with the sale of Seagram products. The question thus presented is whether a statute recognizing the validity of a contract imposing restrictions upon personal property and making them binding upon third persons acquiring such property with notice thereof, is unconstitutional as depriving such persons of property without due process of law.

We again call attention to the fact that the federal

* The cost testified to apparently does not include overhead, operating expenses or other items properly chargeable thereto, but refers only to the actual amounts paid for the merchandise in question.

cases which defendant cites, holding resale price maintenance contracts invalid, recognized the power of the legislature to legalize such contracts and to make them effective as against third persons with notice thereof. (p. 15, *supra.*) However, even in the absence of statute, courts have recognized the validity of equitable servitudes on personal property similar to those in this case and have granted equitable relief against third persons acquiring the property with notice thereof. A recent recognition of the foregoing principle is found in *In re Waterson Berlin & Snyder Co.,* 48 Fed. (2d) 704 (C. C. A. 2-1931). In holding that an assignee of a copyright was subject to a royalty agreement in favor of the copyright owner, the court stated (708):

> "Courts in the United States have enforced rights resembling an equitable servitude binding on a third party who has acquired personal property from one who is under a contract to use it for a particular purpose or in a particular way." (Citing numerous authorities.)

In *Murphy* v. *Christian Press Ass'n Pub. Co.,* 38 App. Div. 426, 56 N. Y. S. 597 (1899), cited in the *Waterson* case, the court enjoined the defendant from selling books at prices lower than those stipulated in an agreement between plaintiffs and The Catholic Publication Society from whom defendant acquired the books.

In *Hartman* v. *John D. Park & Sons Co.,* 145 Fed. 358 (C. C. Ky. 1906), reversed 153 Fed. 24, *supra,* Cochran, J., suggested (p. 387), the possibility of applying the doctrine of *Tulk* v. *Moxhay,* 2 Phillips 774 (1848), 41 Eng. Rep. 1143, where a covenant restricting the use of land was held enforcible in equity as against a third person acquiring the property with

general class produced by others. It is not a penal statute. It provides for no punishment or fine. It deprives no price cutter of a day in court. On the contrary, it merely defines price cutting where the manufacturer or producer has fixed a retail price, to be unfair competition and actionable in the courts of the land at the instance of a person damaged thereby. If no damage is shown, no remedy can be had. If the commodity sold is a commodity which is not in competition with commodities of the same general class, the statute is not operative. The Act does not apply to any contract or agreement between producers or between wholesalers or between retailers as to the sale or resale prices. Such agreements may still be unlawful. Under the pro- [fol. 2-48] tection of judicial proceedings, the respective rights of the parties are to be determined. This, of course, contemplates a time and a place fixed by law and a judicial determination of the facts necessary to be shown before complainants are granted rights and remedies and defendants charged with obligations and burdens.

It has been contended upon argument that the word "actionable" in the Statute is to be concerned only as granting a remedy at law for damages and that the Statute did not contemplate a remedy in equity by way of injunction. It is clear that the word "actionable" as used in the Statute contemplated actions both in law and equity at the instance of any party aggrieved by the unfair competition denounced in the Act. The legislature in the new Practice Act, effective January 1, 1934, defined the word "action" as used in that Statute to mean proceedings both in law and in equity. A proper construction of the Act in question demands that the word "actionable" be given that meaning which the legislature had already given it in prior legislation.

Paraphrasing the language of Justice Holmes in his dissenting opinion in the Tyson Case, supra, I am far from saying that I think this particular law is a wise and rational provision. That is not my affair. But if the people of the State of Illinois speaking by their authorized voice say that they want it, I see nothing in the Constitution of the United States or the Constitution of the State of Illinois to prevent their having their will and as was said by the learned Justice Stone in the same case, "For me the question is one of power and not of expediency."

[fol. 2-49] The motion of the defendant, Carl W. McNeil, to dismiss the bill of complaint and to dissolve the injunction, is denied.

Certificate of Judge, authenticating report of proceedings at trial.

Stipulation to incorporate original copy of the report of proceedings at the trial in the record on appeal.

Certificate of clerk of the Circuit Court of Cook County that the record is a true, perfect and complete transcript of record in his office in said case.

Respectfully submitted, J. Herzl Segal, Attorney for Appellant.

[fols. 3 & 4] IN SUPREME COURT OF ILLINOIS

ERRORS RELIED UPON FOR REVERSAL

1. The trial court erred in overruling the motion of the defendant for a decree dismissing the complaint for want of equity on the ground that the complaint is substantially insufficient in law.

2. The trial court erred in not sustaining said motion of the defendant for a decree dismissing the complaint.

3. The decree entered by the trial court is contrary to law.

4. The decree entered by the trial court is in violation of the Federal and State constitutions in that it grants relief upon a complaint brought under a statute which violates said constitutions in the respects set forth in defendant's motion for a decree dismissing the complaint.

5. The trial court erred in not adjudging the Fair Trade Act to be unconstitutional and void.

6. The trial court erred in not dismissing the complaint for want of equity.

[fol. 5] IN SUPREME COURT OF ILLINOIS, APRIL TERM, 1936

Agenda 27

Docket 23475

JOSEPH TRINER CORPORATION, a Corporation, Appellee,

vs.

CARL W. McNEIL, Doing Business as McNeil's Liquor Store, Appellant

Appeal from the Circuit Court of Cook County

OPINION—Filed June 10, 1936

Mr. Justice WILSON delivered the opinion of the court:

This is a proceeding instituted by the plaintiff seeking relief under the provisions of the Fair Trade act, approved July 8, 1935. (Ill. State Bar Stat. 1935, p. 3091; Smith's Stat. 1935, p. 2893.) The title of the statute expresses its purpose as "An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name." Section 1 provides: "Sec. 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

"(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

[fol. 6] "Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may

be resold without reference to such agreement in the following cases:

"(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity; provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

"(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

"(3) By any officer acting under the orders of any court."

There appears to be no serious contention that the act, up to this point, is invalid and unenforcible. We are particularly concerned with section 2 which declares that "wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

The third section provides that the act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. The Fair Trade act thus permits vertical resale price maintenance but condemns, as do the Federal and State Anti-trust laws, horizontal arrangements for fixing prices. The act prescribes no criminal penalties.

The facts upon which this action is predicated are not in dispute. Schenley Distributors, Inc., licensed to transact business in Illinois, is the sole sales agent and representa- [fol. 7] tive in this State for certain liquors and alcoholic beverages manufactured by several affiliated distilleries known as the Schenley distilleries. "Old Quaker" is the brand name of one of the Schenley products and the name has been duly registered as a trademark with the United States patent office. Affixed to each bottle of "Old Quaker" is a distinctive label upon which appear the figure of a Quaker standing before a sheaf of grain, a sack of malt

and three barrels marked "Old Quaker Whiskey." Above the picture is the legend, "Bottled at the Distillery. Old Quaker. Reg. U. S. Pat. Off. Brand." The name "Old Quaker" appears in bold lettering. Below the picture there is this statement: "One pint. Straight bourbon whiskey. Distilled and bottled by the Old Quaker Company. Distillers. Lawrenceburg, Indiana. Division of Schenley Products Company." The whiskey has been sold and retailed under the trade-mark which definitely designates the brand and has become well known to the trade. This brand is retailed at $1.89 per quart, 98 cents per pint and 50 cents per one-half point. These prices, under existing conditions, appear to be fair prices when considered with like commodities.

The method of merchandising "Old Quaker", as set forth in the complaint, is as follows: Schenley Distributors, Inc., the sales agent, sells to ten wholesale distributors in Chicago, one of whom is the plaintiff, suggesting to these local distributors a minimum retail price which it fixes as the uniform retail price for "Old Quaker" and each of the other brands of Schenley products to be sold in Chicago. This price is the uniform and standard Schenley retail price. If a distributor sells to a retailer who is known to sell below the Schenley list price, Schenley Distributors, Inc., refuses further to sell Schenley products to such dis- [fol. 8] tributor. The distributors, in turn, refuse to sell "Old Quaker", or any other Schenley product, to any retailer in Chicago except on the condition that such retailer will not sell below the uniform Schenley retail price. To that end, the plaintiff and the other local distributors make all sales of "Old Quaker" or other Schenley products under agreements of sale denominated "Fair Trade Agreements", which expressly provide that the retailer will not resell in the city except at the uniform and standard Schenley retail price. From the allegations of the complaint it further appears that as a direct result of the trade policy and practice described, approximately eighty-five per cent of the retailers of Schenley products in Chicago consistently maintain the Schenley retail price list for "Old Quaker" and other Schenley brands.

The Joseph Triner Corporation, the plaintiff, is a domestic corporation engaged in business in Chicago as a wholesale distributor, selling to retailers for re-sale in that city

various brands of liquor and alcoholic beverages of standard quality. On November 8, 1935, it brought an action in the circuit court of Cook county to restrain Carl W. McNeil, the defendant, a liquor retail dealer, from selling Old Quaker whiskey in the Chicago district at prices less than those provided in the fair-trade agreements previously mentioned. From the allegations of the complaint, which the defendant by his motion to dismiss admitted to be true, it appears that the plaintiff was also operating pursuant to the trade policy and practice by which the Schenley Distributors, Inc., sought to maintain the prices specified in the fair trade agreements."

[fol. 9] The complaint charges that a few vendors of liquor at retail in Chicago pursue a practice of "cutting" the prevailing retail price of brands of liquor which have acquired widespread attention and public favor. These retailers, it is charged, sell the popular brands at prices conspicuously lower than the prevailing price, and at a loss or scant return to themselves for the purpose of attracting the public to their stores and selling other brands of liquor or general merchandise at prices sufficiently high to meet the loss and assure a general profit. The use of "leaders" in this familiar form of price-cutting is asserted to cause irreparable loss not only to the producer of brands sold at the cut-price and to the distributors of such brands, but also to the ultimate consumers or general public.

The plaintiff, at the time of filing its complaint, had established a substantial and profitable business in selling at wholesale "Old Quaker" and other Schenley products in Chicago. A valuable asset of its business is the good will of the retailers who purchase from it for resale in the city the various brands of Schenley products, including "Old Quaker". Similarly, the good will of the public and consumers who purchase such products is deemed an important asset. According to the complaint, a uniform price assures the retailers comparative immunity from injurious price-cutting by other retailers and a reasonable profit upon their retail sales.

In October, 1935, the defendant, with full knowledge of the fair trade agreements entered into by the plaintiff and the other local Schenley distributors with substantially all the retailers of liquor in Chicago, threatened to sell,

offer for sale and advertise for sale at retail, a quantity of "Old Quaker" at a price appreciably below the uniform [fol. 10] Schenley retail price for the brand stipulated in the contracts. On October 16, the plaintiff informed the defendant of its trade policy in maintaining a uniform price for "Old Quaker" and other Schenley brands throughout the city. In particular, the defendant was advised of the provisions of the fair trade agreements executed conformably to the Fair Trade act. He was also informed of the irreparable injury which would result to the plaintiff if he persisted in executing his threat to "cut" the price of "Old Quaker". The plaintiff specifically requested the defendant to refrain from his contemplated course and indicated its willingness to sell him any Schenley products he might wish, provided he would agree not to sell them at retail below the standard list price. Subsequently, on several occasions, the defendant offered for sale and sold large quantities of "Old Quaker" at 77 cents per pint, or more than twenty per cent below the Schenley uniform retail price. Defendant was again urged to desist but refused. On November 8, 1935, he advertised "Old Quaker" for sale at 77 cents per pint.

None of the quantity advertised or sold by the defendant at the cut-price was offered for sale or sold in the course of closing out any of such quantity for the purpose of discontinuing deliveries, nor because any of the liquor was damaged or deteriorated, nor owing to a court order. In short, the defendant does not come within the exceptions enumerated in section 1 of the Fair Trade act. During this time "Old Quaker" was in fair and open competition with about ten other brands of the same general class of commodity produced by persons other than the manufacturers of Schenley products.

[fol. 11] The plaintiff charged that as a consequence of the defendant's conduct, a great number of retailers in the area where the defendant's store was located threatened to violate their contracts with it and the other local Schenley distributors by meeting the competitive price fixed by the defendant, and that several of the retailers did, in fact, breach their agreements. The result of meeting the cut-price established by the defendant was that the sales at the reduced prices did not yield the retailers a fair and reasonable profit, and that when the public requested "Old

Quaker" some of the merchants offered their customers substitute brands.

The concluding allegations of the complaint are that if the defendant continues his practice, the plaintiff will suffer irreparable injury to its business in the following respects: (1) Retailers who have signed Fair Trade agreements will be compelled to violate their agreements and sell below the Schenley standard price; (2) the cut-price will cause the public and consumers to believe that "Old Quaker" is not worth the uniform retail price and, in consequence, the retailers will be unable to sell at the standard price; (3) great loss to the good will established by the local distributors will ensue and the value of the trade-marks and trade-names of the Schenley products destroyed; (4) the public will become confused as to the various brands of such products, and (5) the market for them in Chicago will become demoralized and produce a general uneconomic lowering of prices. The acts of the defendant previously set forth constituted, according to the plaintiff, an imminent threat to the destruction of its business. Money damages, it was claimed, would not compensate the plaintiff, and restraint of the defendant was alleged to be necessary to prevent multiplicity of legal proceedings.

[fol. 12] The defendant, by a motion to dismiss the complaint, challenged the constitutionality of the Fair Trade act. The court held the statute valid and over-ruled the motion to dismiss. The defendant elected to abide by his pleading, and a decree was entered permanently enjoining him from vending at retail "Old Quaker" whiskey at a price below $1.98 per quart, 98 cents per pint, and 50 cents per one-half pint, until the standard and uniform Schenley retail price for the brand named should be changed in Chicago. To obtain a reversal of that decree the defendant prosecutes this appeal.

The defendant contends that the decree is erroneous for the reason that the Fair Trade act violates the Federal and State constitutions in the particulars set forth in his motion to dismiss the plaintiff's complaint. The propriety of the remedy employed is not assailed. The single question thus presented for decision is whether the statute squares with the Federal and State constitutions or offends them in the respects assigned and argued by the defendant.

The contention is made that the Fair Trade Act violates the equal protection of the laws provision of the fourteenth amendment to the Federal constitution, the due process clauses of the Federal and State constitutions, and also section 22 of article 4 of the State constitution. To sustain the decree the plaintiff maintains that the Fair Trade act constitutes a valid exercise of the police power and that the statute is not open to the constitutional objections interposed.

The police power may be exercised not only in the interest of the public health, morals, comfort and safety, but also for the promotion of the general welfare. Fenske Bros. v. Upholsterers Union, 358 Ill. 239; City of Aurora v. Burns, [fol. 13] 319 id. 84. The case last cited contains a notable exposition of the doctrine that the police power of the State is not a static or dormant concept but is sufficiently dynamic to meet the varying needs of modern society. This court, in sustaining the validity of a zoning ordinance, observed: "With the growth and development of the State the police power necessarily develops, within reasonable bounds, to meet the changing conditions. (Public Utilities Com. v. City of Quincy, 290 Ill. 360. The power is not circumscribed by precedents arising out of past conditions, but is elastic and capable of expansion in order to keep pace with human progress. Mr. Justice Holmes well defined the nature and extent of the power in Noble State Bank v. Haskell, 219 U. S. 104: 'It may be said in a general way that the police power extends to all the great public needs. (Camfield v. United States, 167 U. S. 518.) It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.'"

Legislatures have long endeavored to promote free competition by laws aimed at trusts and monopolies such as the Anti-Trust act of this State enacted in 1891. (Ill. State Bar Stat. 1935, p. 1235; Smith's Stats. 1935, p. 1201). It is manifest that when the General Assembly enacted the Fair Trade act in 1935 it was attempting to modify its former policy and to adopt an economic concept which has received widespread popular approval in recent years. The gist of the theory is that the manufacturer of a trade-marked article, sold in competition with articles of similar nature, who has designated a fair price at which he, as well as his

distributor and retailer, can make a fair profit, has a property right in the good will towards his product which he [fol. 14] has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to employ it in a misleading manner for the purpose of deceiving the public. "The basic theory on which this concept rests", observed the California Supreme Court in Max Factor & Co. v. Kunsman, 55 Pac. (2d) 177, "is that, from a social standpoint, price cutting, in the long run, adversely affects the public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products." Section 2 of the California Fair Trade act, as does section 3 of our law, prohibits manufacturers from contracting between themselves to fix resale prices.

To the extent that the Fair Trade act effects a change in the economic public policy of this State we have no power to interfere. It is wholly immaterial whether the individual members of this court agree with the economic and social philosophy upon which the Fair Trade act is established, and no duty rests upon us to pass upon the wisdom of the economic public policy which it declares. That function is wholly legislative. It is not a judicial function to lecture either the public or business. Neither is it within the province of a court to philosophize concerning economic conditions. In passing, however, we can not help but note that many of the present legislative enactments such as the Fair Trade acts of New York, California and Illinois are resultants brought about because of the failure of the public and, particularly, the business public to observe those ethical principles which lie at the very foundation of fair dealing and business honesty. The shady efforts made by some to obtain an unfair advantage over others are not compatible with good citizenship, nor in keeping with the best tra- [fol. 15] ditions of the law merchant as known at the common law. If public opinion can not check these practices then business can expect legislatures to attempt to remedy them.

The Fair Trade act is intended to curb one of these practices by protecting the manufacturer who has built up a brand or article based on quality and excellence, and preventing its use as a "loss leader" by those who would sell it

for the purpose only of inveigling the public into patronizing their places of business in the hope of obtaining a profit on other goods of inferior quality. In other words, the reputation of the one is used for the personal advantage of the other. The legislative determination of whether this statute is a proper exercise of the police power, however, is not necessarily conclusive. Whether the means employed have any real substantial relation to the public health, comfort, safety or welfare, or are essentially arbitrary and unreasonable, is a question which is subject to review by the courts. People v. Belcastro, 356 Ill. 144; People v. Rosehill Cemetery Co., 334 id. 556; Condon v. Village of Forest Park, 278 id. 218; People v. Steele, 231 id. 340.

The defendant maintains that section 2 of the Fair Trade act arbitrarily deprives him of his right to determine the price at which he will sell his commodities and, in consequence, violates the due process clauses of the Federal and State constitutions. The right asserted is not unfettered and is, of course, subject to the legitimate exercise of the police power. Although we find that only two courts of last resort have passed upon the validity of Fair Trade acts such as the one in controversy, an analogous statute was held constitutional nearly twenty years ago. Robt. H. Ingersoll & Bro. v. Hahne & Co., 88 N. J. Eq. 222, 101 Atl. 1030. A statute of the State of New Jersey enacted in [fol. 16] 1916 declared it unlawful for any merchant, firm, or corporation to appropriate for his or their own use a name, brand, trade-mark, reputation, or good will of any maker in whose product they dealt, or to discriminate against it by depreciating the value of the products in the public mind by misrepresentation as to value or quality or by price inducement, except where the goods did not carry a notice prohibiting such practice. The factual situation disclosed that the complainant, a manufacturer of watches, sold under the Ingersoll name, among others, a watch known as the "Yankee Watch." This product was advertised throughout the United States to be sold to the consumer at $1.35. The complainant charged that the only method by which the watches could be sold for this low price was to manufacture them in immense quantities, and that the only way to obtain customers upon a large scale was by extensive advertising; that the name "Ingersoll" and the reputation of the firm for fair dealing and reliable products was

nation wide; that it was absolutely necessary as a part of the advertising and building up of the business that a definite fixed price should form a part of the advertising for each of the products, and that all the Ingersoll watches were sold subject to a notice forbidding the retailer to dispose of them for less than a price fixed by the manufacturer. A jobber in New York disposed of the watches to a New Jersey retailer, who sold them for less than the standard price. Upon the facts presented the statute was held valid. The vice-chancellor, in his opinion, said: "Complainant has no monopoly. Its goods are not manufactured under patents. It is constantly in competition with manufacturers of cheap watches. Not only is it morally bound as a result of its advertising to guarantee its product, but it, in fact, [fol. 17] guarantees it in writing. The defendant makes use of the name, reputation, and guaranty of complainant for its own ulterior purpose and appropriates to itself the effect of the extensive advertising, upon which the complainant depends, for defendant's own profit, in violation of the contract expressed in the notice, and with no desire to benefit the public. A retailer does not sell a standard article at a loss for eleemosynary purposes."

The injunction granted the complainant was subsequently made permanent in Robt. H. Ingersoll & Bro. v. Hahne & Co., 89 N. J. Eq. 332, 108 Atl. 128. The same jurist in this later case pointed out that even in the absence of statute, contracts relating to trade and containing restraints are valid if such restraints are reasonable. In particular, the court said: "It is also well recognized that a person has a property interest in his trade-name and good will, and will, even in the absence of statute, be protected against injury to that trade-name and good will. This right has in this State been as above indicated recognized by statute. * * * In those cases in which the right to fix a resale price has been under consideration, the prohibition against the resale has been against the resale of the article itself. The name or trade-mark or what not has been so much an integral part of the article as that a resale of the article without reference to the trade-mark or trade-name would be practically impossible. In the case at bar the prohibition is not against a resale of the article, nor is it impracticable to resell the article without reference to the trade-name. * * * Complainant does not seek to retain any right in

the article itself; it merely seeks to restrain the use of its trade-name and good will, except under conditions fixed by it. It may permit the purchaser of the article to use its trade-name and good will under such conditions as it sees [fol. 18] fit. * * * It seems to me that there is a clear distinction between those cases in which the nature of the restraint is such as necessarily to affect the resale of the article itself and the case at bar where the nature of the restraint is not such."

The contention was made in the celebrated case of Nebbia v. New York, 291 U. S. 502, that because the Milk-Control law of New York essayed to control prices it denied due process. The Supreme Court of the United States in answering this contention, said: "The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the State is incapable of directly controlling the price itself. This view was negatived many years ago. Munn v. Illinois, 94 U. S. 113."

The court reviewed numerous decisions (German Alliance Insurance Co. v. Lewis, 233 U. S. 389; Griffith v. Connecticut, 218 id. 563; O'Gorman & Young v. Hartford Fire Ins. Co., 282 id. 251; Frisbie v. United States, 157 id. 160; Yeiser v. Dysart, 267 id. 540; Cotting v. Kansas City Stockyards Co., 183 id. 792 and Stephenson v. Binford, 287 id. 251;) showing that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices. The court then observed: "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of gov- [fol. 19] ernmental authority or condemn it as arbitrary or discriminatory. Wolff Packing Co. v. Industrial Court, 262 U. S. 522, 535. The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for

the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest,' and 'clothed with a public use,' have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and affect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

The defendant, however, invokes Doubleday, Doran & Co. v. R. H. Macy & Co., 269 N. Y. 272, 199 N. E. 409, in which section 2 of the New York Fair Trade act, identical with the same section of our statute assailed in the present case, was held unconstitutional as applied to the facts set forth in the complaint. The articles in question were books. The Doubleday books are not commodities within the accepted meaning of the term. Each book rests upon its own merit and outside of the binding and paper content it bears no similarity to the intent of the term used in the act, namely, commodities. A general statute such as the Fair Trade act may, of course, be invalid when applied to one set of facts and clearly valid when applied to other [fol. 20] fact situations. Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282. The court, in Max Factor & Co. v. Kunsman, supra, distinguished the Doubleday, Doran & Co. decision and held it inapplicable to the facts presented in the California case. The court said: "The plaintiffs in the New York case were Doubleday, Doran & Co., Inc., publishers, and Doubleday, Doran Book Shops, Inc., retailers. The contract mentioned in the decision is one between the publishing corporation and the retailing corporation. Aside from any inference to be drawn from the similarity of names, the opinion states that the two plaintiffs, in reality, were one and the same, for it refers to 'the price which they (the plaintiffs) stipulated as a retail price in a *contract between themselves.*'

Other language indicates the book shop corporation is merely a subsidiary and agent of the publishing company.

Again, the plaintiff publishers sold the books in question to the defendant without exacting or, in so far as appears, attempting to exact, from the buyer any restriction on the price for resale. In other words, the producer of goods placed a retail price upon its product by its own independent action, and voluntarily sold the goods to a retailer (Macy & Co.) for resale without seeking, or at least obtaining, any agreement by the retailer to observe any retail price. In the action, it seeks to prevent the retailer, to whom it has sold the goods within restrictions, from selling the goods at prices less than those which the producer saw fit to fix, in a contract between it and a subsidiary. The New York court accepts, for the purpose of the decision, the interpretation of the act as covering such situation, and, upon that assumption, and apparently that assumption alone, holds section 2 of the act to be unconstitutional. The plaintiffs in the New York case allege only a single contract purporting to fix the resale prices, and that in a pretended contract made with itself, far different from the [fol. 21] factual set-up in the Max Factor & Co. case. Here there has been adopted a system of making written contracts, generally between producers and retail distributors, under which the products may and will be sold only to retailers who will resell at specified prices and have entered into contracts with the distributor to so sell such products. Practically all of the wholesale and retail druggists in California have executed such contracts, and are observing them, and the plaintiffs' distributors have refused, and will refuse, to sell such products to wholesalers or retailers who do not enter into such contracts. A contract has been tendered to defendant for execution, but defendant will not enter into the agreement. The plaintiffs therefore decline to sell the commodities to defendant unless the defendant enters into the contract. The defendant, with full knowledge of the system of contracts, and the extent of the execution and compliance with their terms by the trade, has obtained Factor products 'unbeknown' to plaintiffs, and is selling them at prices less than the prices fixed by the contracts so extensively entered into by others. These facts serve to vitally differentiate the situation in New York from that here."

The defendant argues, however, that the Fair Trade Act creates an arbitrary classification of persons, and grants

to such persons special privileges and immunities in contravention of the constitutional guaranties invoked. He asserts that the vendors and vendees of commodities bearing the trade-mark, brand or name of the producer or owner may under certain circumstances fix the resale price thereof immune from the criminal penalties prescribed by the Anti-Trust act. The argument rests upon the assumption that there is no national basis for denying to the vendors and vendees of commodities not bearing such [fol. 22] trade-mark symbols the right to fix the resale price without incurring the penalties of the Anti-Trust act.

The first section of the fourteenth amendment to the Federal constitution declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The fourteenth amendment does not purport to prevent a State, however, from adjusting its legislation to differences in situation and to that end to make a justifiable classification. It merely requires that the classification shall be based on a real and substantial difference having a rational relation to the subject of the particular legislation. Nebbia v. New York, supra; Power Manufacturing Co. v. Saunders, 274 U. S. 490; Lindsley v. Natural Carbonic Gas Co., 220 id. 61; Magoun v. Illinois Trust and Savings Bank, 170 id. 283; Mich. Millers Ins. Co. v. McDonough, 358 Ill. 575; Stewart v. Brady, 300 id. 425.

Supplementing the equal protection provision of the fourteenth amendment, section 22 of article 4 of the constitution of this State prohibits the passage of a special law granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. The purpose of this provision is to prevent the enlargement of the rights of one or more persons and the impairment of or discrimination against the rights of others. To avoid falling within the constitutional inhibition of special legislation the classification of subjects or objects must be based upon some reasonable and substantial difference in kind, situation or circumstance bearing a proper relation to the purposes to be attained by the statute. Mich. Millers Ins. Co. v. McDonough, supra; Jones v.

[fol. 23] Chicago, Rock Island and Pacific Railway Co. 231 Ill. 302.

The California Supreme Court, in passing upon the validity of the Fair Trade act of California, section 1½ of which corresponds to the Fair Trade act of our State, Max Factor & Co. v. Kunsman, supra, said: "Respondent also urges that the statute denies equal protection of the laws in that it applies only to articles sold under a trade-mark or trade or brand-name, and does not apply to nontrade-marked commodities, and, among trade-marked articles, applies only to those in free and open competition with others of a similar nature. As already pointed out, it is only in reference to those commodities included within the statute that the manufacturer or producer has a property right in the nature of good will, which, in the public interest, should be protected. Such a classification is reasonable. The exclusion of trade-marked articles not in free and open competition with others of a similar nature is likewise reasonable. By that provision the public is protected from artificially high prices imposed by one with an exclusive market."

The Anti-Trust act expresses the public policy of the State against trusts and combinations, organized for the purpose of suppressing competition and creating monopoly. Harding v. American Glucose Co. 182 Ill. 551; The Fair Trade act does not assume to permit restrictions on the price at which trade-marked commodities may be resold, irrespective of whether resold under the trade-mark. It permits restrictions to be placed on the use of trade-marks, names and brands, not restrictions on the price of commodities generally, except, as the plaintiff contends, to the extent that new commodities may become involved [fol. 24] in an attempt to damage the good will built around a trade-mark, name or brand. The manifest legislative intent is the protection of the property interest in a mark, name or brand by preventing the use of the symbol by price-cuting retailers in ways likely to depreciate the property interest. Such competitors could also destroy a commodity built on merit by underselling and thus destroying the purpose of the label intended to signify quality. As applied to the present case, by using the trade-name of a well known liquor the defendant, in effect, attracts the public to his store and thereby induces the visitors to

become purchasers of other goods offered for sale. The defendant thus benefits at the expense of the trade-name, "Old Quaker", by using the plaintiff's products as a means to draw trade. Price-cutting primarily injures the owner of a good will which has become identified with a trade-mark, brand or name, on a commodity competing in the market with other goods of the same general class. On the other hand, the manufacturers and distributors of commodities which bear no trade symbol obviously cannot have a good will which requires the protection afforded by the Fair Trade act.

The only resale price maintenance, if any, permitted by the Fair Trade act is vertical. Vertical price maintenance merely enables a producer, or his distributor, to set a price at which the trade-marked commodity shall be sold to the consumer. Section 1 specifically provides that a commodity in order to be subject to the contracts permitted under the Fair Trade act must be "in fair and open competition with commodities of the same general class produced by others." Section 3 declares that the act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or [fol. 25] resale prices. In short, it does not apply to horizontal price maintenance. The statute clearly does not even tend to legalize trusts or monopolies. It does tend to prohibit trusts and monopolies. Robert H. Ingersoll & Bro. v. Hahne & Co. supra; Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 137 Pac. 144. Application of section 2 of the statute to the facts discloses that "Old Quaker" whiskey is in competition with other whiskies of like grade being sold in the Chicago market. No restraint rests upon the defendant inhibiting him from dealing in the competing goods of other products of the same general class sold by the plaintiff. He can freely sell whiskey at a lower price than the standard price for "Old Quaker." The statute merely prevents him from filching the good will associated with the descriptive mark and name of "Old Quaker" for his own ulterier purposes.

Horwich v. Walker-Gordon Laboratory Co., 205 Ill. 497, is cited, however, to support the defendant's position that the Fair Trade act violates the constitutional limitations against arbitrary classification. This court, in the case relied upon, held that the Trade-mark act of 1901 violated

Section 22 of article 4 of our constitution. Section 2 of the statute declared it illegal for any person, without the written consent of the owner, to sell certain receptacles bearing the trade-mark, brand or name of the owner. Section 3 made the possession, by any junk dealer of receptacles bearing registered trade marks prima facie evidence that such possession was unlawful. The fourth section prescribed criminal penalties for the violation of the provisions of the act. An action was brought under section 6 which provided that any person might be enjoined from violating the second section. The court pointed out that the purpose of the statute was to facilitate the recovery of the receptacles [fol. 26] described in the first section which had passed from the possession of their owners to others, and which the owners desired to recover summarily. On the other hand, the Fair Trade act of 1935 has for its major objective the preservation and protection of the property interest of the producer and his distributors in the good will represented by brands, trade-marks and trade-names. The law is also designed to protect the consumer's interests. The legislature by this act, has attempted to benefit alike the producer, the distributor and the public. It is apparent that the objective of the Fair Trade act is not some purely personal goal such as the summary recovery of certain types of personal property. The Horwich case, it is true, dealt with trade-marks but solely in their character as indicia of ownership. In the present case, the statute attacked deals not only with trade-marks in that respect but also with the good will built up by a producer or distributor around a trade-mark, trade name or brand, and provides that certain conduct with respect to the use of such trade-marks, names or brands constitutes unfair competition.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, is also invoked to sustain the defendant's position. The Illinois Trust act of June 20, 1893, prohibited trusts or combinations in restraint of trade or competition. Section 9 excepted from the provisions of the act agricultural products or livestock while in the hands of the producer or raiser. Section 10 provided that the purchaser of any article or commodity from such a trust or combination, should not be liable for the price and might plead the act as a defense to any action therefor. Suit was brought to recover for the

sale of sewer pipe and the statute was pleaded as a defense. The United States Supreme Court held that the discrimination created by the ninth section rendered the act repug- [fol. 27] nant to the provisions of the fourteenth amendment respecting the equal protection of the laws. The defendant argues that no distinction can be drawn between the classification condemned in the Connolly case and that provided by the Fair Trade act. The argument rests upon the premise that the Fair Trade act, in like manner as the Trust act of 1893, creates an unfair and arbitrary classification in flagrant violation of the constitutional guarantee of equal protection of the laws. It is urged that the new law attempts to legalize business practices which have long been deemed illegal under the Anti-Trust act. The arguments are based upon erroneous premises and therefore must fall. The Anti-Trust act was never intended to interfere with the protection given to the good will established around the use of a trade-mark, brand or name. Obviously, it does not even purport to render illegal the conduct sanctioned by the Fair Trade act. Moreover, a retailer such as the defendant is not expressly prohibited from removing the trade symbol and selling the whiskey, which he owns, at whatever price he pleases. Manifestly, there can be no interference with the enforcement of the Anti-Trust law under such circumstances.

An insuperable objection to the validity of the Fair Trade act, the defendant insists, is that the provisions of the statute are so incomplete, vague, indefinite and uncertain that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application. Statutes vulnerable to the objection stated have been declared unconstitutional as denying due process. Champlin Refining Co. v. Commission, 286 U. S. 210; Parks v. Libby-Owens- [fol. 28] Ford Glass Co., 360 Ill. 130. On the other hand, where the words assailed, taken in connection with the context, are commonly understood, their use does not render a statute invalid. People v. Huls, 355 Ill. 412. Furthermore, the legislature is not required to define words in common and daily use. People v. Lloyd, 304 Ill. 23. A statute is sufficiently certain if the words and phrases employed have a technical or other special meaning well enough known to enable those within their reach to correctly apply them. Hygrade Provision Co. v. Sherman, 266 U. S. 497; Omaechevarria v.

Idaho, 246 id. 343; People v. Mueller, 352 Ill. 124; Amberson v. Amberson, 349 id. 249; Kowalczyk v. Swift & Co., 329 id. 308. In the light of these authorities the following words and expressions segregated and scrutinized by the defendant are not so ambiguous as to render the Fair Trade act void for uncertainty: "articles of standard quality" employed only in the title, the phrase "in fair and open competition" in section 1, the words "any commodity" and the expression "any contract entered into pursuant to the provisions of section 1" in section 2.

The remaining contention which requires consideration is that section 2 of the Fair Trade act contravenes section 1 of article 4 of the constitution of this State which provides that the legislative power shall be vested in the General Assembly. It is argued that section 2 delegates to such individuals as choose to avail themselves of the benefits of the statute the power to regulate the prices of commodities sold by others. The contention and the argument supporting it rest upon the unwarranted assumption that the Fair Trade act is primarily, and not incidentally, a price-fixing statute. In referring to the purpose of the California Fair Trade act, the Supreme Court of that State, observed that the statute did not merely prohibit price-[fol. 29] cutting for the purpose of regulating prices but also prohibited the practice in a legitimate legislative attempt to afford protection to the validly-acquired rights of others. Max Factor & Co. v. Kunsman, supra. The Fair Trade act of this State does not even attempt to fix or delegate to others the right to fix the price at which any commodity may be sold in the market. It is true, however, that resale price maintenance laws such as the Fair Trade acts of California, New York and Illinois constitute permissive or conditional legislation. Specifically, our statute does not contain any mandatory requirements nor does it fix the prices which are to be imposed. No question of governmental price-fixing is, in consequence, involved. In other words, the law would remain wholly inefficacious unless the conditions which it prescribes are met. The plaintiff, for example, is not commanded to operate under it. Only in the event that manufacturers or distributors elect to avail themselves of its provisions does the statute come into actual operation. This does not mean that the act took effect upon the approval of any authority other than the

legislative branch of our State government. Commonwealth v. Goldburg, 167 Ky. 96, 180 S. W. 68. When the Fair Trade act was passed by the General Assembly it was a complete statute, in no manner dependent for approval or disapproval by any person or group of persons. The defendant's contention that the statute unlawfully delegates legislative power is without merit.

Two objections interposed in the trial court, namely, that the Fair Trade act violates the constitutional provisions against legislation impairing the obligation of contracts, and that it constitutes an invalid attempt to regulate the sale of commodities in interstate commerce have not been argued on this appeal. They do not, therefore, require consideration.

The decree of the trial court is right, and it will be affirmed.

Decree Affirmed.

[fol. 30] IN SUPREME COURT OF ILLINOIS

No. 23475

JOSEPH TRINER CORPORATION, a Corporation, Appellee,

vs.

CARL W. McNEIL, Doing Business as McNeil's Liquor Store, Appellant

Appeal from Circuit Court, Cook

JUDGMENT—June 10, 1936

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Decree aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error;

Therefore, it is considered by the Court that the Decree of the Circuit Court of Cook County aforesaid, be Affirmed

in all things and stand in full force and effect, notwithstand- [fol. 31] ing the said matter and things therein assigned for error.

And it is further considered by the Court that the said Appellee recover of and from the said Appellant its costs by it in this behalf expended and that it have execution therefor.

[fol. 32] IN SUPREME COURT OF ILLINOIS

[Title omitted]

MINUTE ENTRY OF SUBMISSION—April 21, 1936

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions, being taken for advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by J. Herzl Segal for appellant and [fols. 33 & 34] by Hamilton Moses for appellee is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 35] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed September 4, 1936

To the Honorable Lott R. Herrick, Chief Justice of the Supreme Court of the State of Illinois:

Your petitioner, Carl W. McNeil, doing business as McNeil's Liquor Store, respectfully shows:

(1) Your petitioner is the appellant in the above entitled cause.

(2) On November 8, 1935 the appellee and plaintiff, Joseph Triner Corporation, filed its complaint in the Circuit Court of Cook County seeking an injunction against the appellant to restrain him from wilfully advertising for sale, offering to sell, or selling whiskey below a uniform price established by the plaintiff in contracts with various third parties other than the defendant, pursuant to the Illinois Fair Trade Act (Smith-Hurd Revised Statutes, 1935, Chapter 121½, Section 188, et seq; Illinois State Bar Statutes, 1935, Chapter 140, Section 8, et seq.). Upon the application of the plaintiff, an order was entered on November 16, 1935 directing the issuance of a temporary injunction. [fol. 36] Thereafter on November 18, 1935 the defendant filed his written motion to dissolve the temporary injunction and to dismiss the complaint for want of equity on the ground that it was substantially insufficient in law. The motion to dismiss challenged the constitutionality of the Fair Trade Act on the grounds that it violates the Federal Constitution (Rec. 34-41; Abst. 29-34) in that it contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States since its provisions, terms and language are so incomplete, vague, indefinite and uncertain that said Act does not express clearly or intelligently the subject matter attempted to be covered and the acts permitted, required or forbidden to be done thereunder, and it deprives the defendant and persons similarly situated of vested rights in articles and commodities owned by him, and it provides for arbitrary, discriminatory, unreasonable and unjust classification of persons. In and by said motion to dismiss appellant further contended that said Fair Trade Act is repugnant to the Fourteenth Amendment to the Contstitution of the United States by denying to appellant the equal protection of the laws in that it denies to appellant and persons similarly situated such right to dispose of his commodities as is enjoyed by persons dealing in commodities not bearing the trade-mark, brand or name of the producer or owner, and it denies to producers and owners of commodities not bearing such trademark, brand or name the right to fix the resale price thereof as is sought to be conferred upon producers and

owners of commodities bearing such trade-mark, brand or name.

The trial court held the statute constitutional and overruled the motion for a decree dismissing the complaint for want of equity. Appellant elected to abide by his motion [fol. 37] to dismiss and accordingly a final decree was entered granting a permanent injunction as prayed for in the complaint. The validity of a statute being involved, the defendant appealed directly to the Supreme Court of Illinois.

Pursuant to the rules of the Supreme Court of Illinois no assignment of errors was filed by appellant, but in the brief and argument filed on behalf of appellant the errors relied upon for reversal were set out (Brief and Argument for Appellant, pages 7 and 8). Appellant assigned as error the action of the trial court in not sustaining said motion of the defendant for a decree dismissing the complaint and that the decree entered by the trial court is in violation of the Federal Constitution in that it grants relief upon a complaint brought under a statute which violates said Constitution in the respects set forth in the defendant's motion for a decree dismissing the complaint.

The Supreme Court of Illinois on June 10, 1936 affirmed the decree of the trial court. As appears from the opinion of the Supreme Court of Illinois (363 Ill. 559) the constitutional questions raised in the trial court were specifically and directly considered and passed upon. Thus on Page 567 the Court said:

"The contention is made that the Fair Trade Act violates the equal protection of the laws provision of the Fourteenth Amendment to the Federal Constitution, the due process causes of the Federal and State Constitutions, and also Section 12 of Article IV of the State Constitution."

Again on Page 569 the Court said:

"The defendant maintains that Section 2 of the Fair Trade Act arbitrarily deprives him of his right to determine the price at which he wil sell his commodities and in consequence violates the due process clauses of the Federal and State Constitutions."

[fol. 38] Also on Page 575 the Court said:

"The defendant argues, however, that the Fair Trade Act creates an arbitrary classification of persons and grants to such persons special privileges and immunities in contravention of the constitutional guaranties invoked."

By its decision the Supreme Court of Illinois overruled all of the foregoing objections raised by appellant and sustained the validity of the Fair Trade Act. No petition for rehearing was filed by your petitioner within the time required by the Rules of the Supreme Court of Illinois and said decision became final on said June 10, 1936. This application for the allowance of an appeal to the Supreme Court of the United States is being hereby made within three months after the entry of said decree by the Supreme Court of Illinois.

(3) The Supreme Court of the State of Illinois is the highest court of said State in which a decision in this suit can be had.

(4) In said cause there is drawn in question the validity of a statute on the ground that said statute is repugnant to the Constitution and laws of the United States, and the decision is in favor of its validity notwithstanding your petitioner's contention that said statute violates the Fourteenth Amendment to the Constitution of the United States.

(5) Therefore, in accordance with Section 237 (a) of the Judicial Code of the United States and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which under the legislation in force when the Act of January 31, 1928 was passed, to-wit: under Section 237 (a) of the Judicial Code of the United States, a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

[fol. 39] (6) The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors filed herewith pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States. There is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as pro-

vided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore your petitioner prays for the allowance of an appeal from the said Supreme Court of Illinois, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final decree of said Supreme Court of the State of Illinois may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Illinois under his hand and the seal of said Court, may be sent to the Supreme Court of the United States as provided by law, and that an order be made touching the security to be required of the petitioner and that the cost bond tendered by petitioner be approved.

Nicholas J. Pritzker, J. Herzl Segal, Stanford Clinton, Attorneys for Petitioner.

Dated August 26, 1936.

[fols. 39½ & 40] [File endorsement omitted.]

[fol. 41] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed September 4, 1936

Comes now the appellant, Carl W. McNeil, doing business as McNeil's Liquor Store, by Nicholas J. Pritzker, J. Herzl Segal and Stanford Clinton, his attorneys, and assigns the following errors on the record and proceedings in this cause:

1. The Supreme Court of Illinois erred in holding that said Fair Trade Act is a valid exercise of the police power.

2. The Supreme Court of Illinois erred in affirming the decree of the Circuit Court of Cook County, Illinois.

3. The Supreme Court of Illinois erred in refusing to reverse the decree of the said Circuit Court of Cook County, Illinois.

4. The Supreme Court of Illinois erred in not holding that said Fair Trade Act is repugnant to the Fourteenth Amendment to the Constitution of the United States for the reason that it deprives the appellant of property without due process of law in that (a) its provisions, terms and language are so incomplete, vague, indefinite and uncertain, particularly in the use of the words "articles of standard [fol. 42] quality", "commodities of the same general class", "in fair and open competition" and "any commodity", that said Act does not express clearly and intelligibly the subject matter attempted to be covered and the acts permitted, required or forbidden to be done thereunder; (b) it deprives the appellant and persons similarly situated of vested rights in articles and commodities owned by him; (c) it provides for arbitrary, discriminatory, unreasonable and unjust classification of persons, one class being producers and owners of commodities bearing a trade-mark, brand or name of the producer or owner and the other class being producers and owners of commodities not bearing such trade-mark, brand or name; (d) it provides for an arbitrary, discriminatory, unreasonable and unjust classification of persons, one class being retailers of commodities bearing the trade-mark, brand or name of the producer or owner and the other class being retailers of commodities not bearing such trade-mark, brand or name; (e) it delegates to persons not constituting the General Assembly of the State of Illinois the legislative power to determine the price at which commodities should be sold.

5. The Supreme Court of Illinois erred in not holding that said Fair Trade Act is repugnant to the Fourteenth Amendment to the Constitution of the United States for the reason that it denies to appellant the equal protection of the laws in that (a) it denies to appellant and persons similarly situated such right to dispose of his commodities as is enjoyed by persons dealing in commodities not bearing the trade-mark, brand or name of the producer or owner; (b) it denies to producers and owners of commodities not bearing such trade-mark, brand or name the right to fix the resale price thereof as is sought to be conferred upon producers and owners of commodities bearing such trade-mark, brand or name; (c) it grants to vendors and [fol. 43] purchasers of commodities bearing a trade-mark,

brand or name of a producer and owner the special and exclusive privilege of fixing the resale price thereof, contrary to the volition of the appellant and persons similarly situated; (d) it grants to retailers of commodities not bearing such trade-mark, brand or name the special and exclusive privilege (which is denied to appellant and persons similarly situated) of selling the commodities owned by them at a price or prices not controlled by persons with whom they have no privity of contract; (e) it grants to vendors and purchasers of commodities bearing such trade-mark, brand or name a special and exclusive immunity (which is denied to appellant and persons similarly situated) from the penalties and punishments imposed by a certain law passed by the General Assembly of the State of Illinois, to wit: "An Act To Provide For The Punishment Of Persons, Copartners Or Corporations Forming Pools, Trusts And Combines, And Mode Of Procedure And Rules Of Evidence In Such Cases"; (f) it delegates to persons not constituting the General Assembly of the State of Illinois the legislative power to determine the price at which commodities should be sold and thus denies to appellant and persons similarly situated the equal right to have all legislative acts performed by the General Assembly of the State of Illinois.

Wherefore, on account of the errors hereinabove assigned, the appellant prays that said decree of the Supreme Court of the State of Illinois entered on the 10th day of June, 1936, be reversed and that the motion of appellant for a decree dismissing the complaint herein for want of equity be sustained and that a decree be entered in favor [fol. 44] of this appellant dismissing said complaint.

Nicholas J. Pritzker, J. Herzl Segal, Stanford Clinton, Attorneys for Appellant.

[fols. 44½-58] [File endorsement omitted.]

[fol. 59] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed September 4, 1936

The petition of Carl W. McNeil, doing business as McNeil's Liquor Store, the appellant in the above entitled cause, for an appeal in said cause to the Supreme Court of the United States from the decree of the Supreme Court of Illinois having been filed with the Clerk of this Court and presented herein accompanied by assignments of error and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered,

It is hereby ordered that an appeal be and is hereby allowed to the Supreme Court of the United States from the final decree dated the 10th day of June, 1936 of the Supreme Court of the State of Illinois as prayed in said petition, and that the Clerk of the Supreme Court of the State of Illinois shall within forty days from this date make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of [fol. 60] the Supreme Court of the United States.

It is further ordered that said appellant shall give a good and sufficient cost bond in the sum of Two Hundred Fifty Dollars ($250.00), that said appellant shall prosecute said appeal to effect and answer all costs if he fail to make his plea good.

Comes now the appellant, Carl W. McNeil, doing business as McNeil's Liquor Store, and presents his cost bond conditioned in accordance with the foregoing order and in accordance with the Statutes of the United States of America, and the undersigned having examined the said bond and the sufficiency of the surety or sureties signing said bond, finds the same to be proper in all respects and has approved the same and hereby orders that the same is approved and shall be filed by the Clerk of this Court.

Entered this 26 day of August, 1936.

Lott R. Herrick, Chief Justice of the Supreme Court of the State of Illinois. (Seal.)

Attest: Adam F. Bloch, Clerk.

[fols. 60½ & 61] [File endorsement omitted.]

[fols. 62-67] Bond on Appeal for $250.00, approved and filed September 4, 1936, omitted in printing.

[fols. 68 & 69] Citation, in usual form, showing service on Moses, Kennedy, Stein & Bachrach, filed September 9, 1936, omitted in printing.

[fol. 70] Be it also Remembered, that to-wit, on the 9th day of September, A. D. 1936, there was filed in the office of the Clerk of the Supreme Court of Illinois appellant's Præcipe for Transcript of the Record, with proof of service thereof and endorsement by appellee as follows:

"The undersigned hereby certifies that the above and foregoing præcipe for transcript of the record is satisfactory to the appellee and the Clerk of the Supreme Court of Illinois is hereby directed to prepare the transcript in accordance with the foregoing.

Joseph Triner Corporation, a Corporation, Appellee, by Moses Kennedy Stein & Bachrach."

which said original Præcipe is in the words and figures as follows, to-wit:

[fol. 71] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

APPELLANT'S PRÆCIPE FOR TRANSCRIPT OF THE RECORD—
Filed September 9, 1936

To Honorable Adam F. Bloch, Clerk of the Supreme Court of the State of Illinois, Springfield, Illinois.

You will please prepare and certify a transcript of the following portions of the record in this cause:

(1) The printed abstract filed herein on January 15, 1936 of the complete record of the Circuit Court of Cook County, Illinois, in this cause.

(2) "Errors Relied Upon For Reversal" contained on Pages 7 and 8 of the brief and argument for appellant filed herein on January 15, 1936.

(3) Opinion of the Court filed herein on June 10, 1936.

(4) Judgment or decree, if any, entered herein.

(5) Petition for allowance of appeal to the Supreme Court of the United States filed on, to-wit, September 4, 1936.

(6) Assignment of errors filed on, to-wit, September 4, 1936.

(7) Statement of jurisdictional facts (required by Rule [fol. 72] 12 Paragraph 1 of the Rules of the Supreme Court of the United States) filed on, to-wit, September 4, 1936.

(8) Order dated August 26, 1936 signed by the Honorable Lott R. Herrick, Chief Justice of the Illinois Supreme Court, allowing the appeal to the Supreme Court of the United States and approving and ordering filed the appellant's cost bond.

(9) Cost bond aproved by the Honorable Lott R. Herrick, Chief Justice of the Illinois Supreme Court, on August 26, 1936.

(10) Notice by appellant to appellee dated August 30, 1936, directing appellee's attention to the provisions of Rule 12, Paragraph 3 of the Rules of the United States Supreme Court and proof of service of said notice and proof of service of the foregoing items Nos. 5, 6, 7 and 8 on Joseph Triner Corporation, a corporation, appellee.

(11) Citation to Joseph Triner Corporation, a corporation, appellee, dated August 26, 1936, returnable in forty (40) days, signed by the Chief Justice of the Supreme Court of Illinois and proof or acknowledgment of service of the citation upon the said appellee.

(12) A statement, if any, of appellee opposing the jurisdiction of the Supreme Court of the United States and a motion, if any, to dismiss or affirm, which appellee may file herein pursuant to Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States within fifteen days after August 30, 1936, the date on which the appellee was served with copies of the foregoing items Nos. 5, 6, 7 and 8.

(13) This præcipe for record filed pursuant to Paragraph 2 of Rule 10 of the Rules of the Supreme Court of

the United States, and the proof or acknowledgment of service thereof on appellee.

(14) Notice of filing this præcipe for record with proof or acknowledgment of service thereof on appellee.

[fol. 73] (15) Any additional præcipe filed by appellee pursuant to said Paragraph 2 of Rule 10 within ten (10) day of the filing of appellant's præcipe.

(16) All documents hereafter filed herein by either appellant or appellee, although not specified above.

(17) A certificate under your hand and the seal of the Supreme Court of Illinois that said transcript contains a true copy of such portions of the record as have been designated by appellant and appellee pursuant to Paragraph 2 of Rule 10 of the Rules of the Supreme Court of the United States, including (in compliance with Paragraph 4 of Rule 12 of said Court) all papers filed under authority of Rule 12 of said Court.

Nicholas J. Pritzker, J. Herzl Segal, Stanford Clinton, Attorneys for Appellant.

Received a copy of the above appellant's præcipe for transcript of record this 4th day of September, 1936.

Joseph Triner Corporation, a Corporation, Appellee, by Moses, Kennedy, Stein & Bachrach, Its Attorneys.

The undersigned hereby certifies that the above and foregoing præcipe for transcript of the record is satisfactory to the appellee and the Clerk of the Supreme Court of Illinois is hereby directed to prepare the transcript in accordance with the foregoing.

Joseph Triner Corporation, a Corporation, Appellee, by Moses, Kennedy, Stein & Bachrack.

[fols. 73½ & 74] [File endorsement omitted.]

[fol. 75] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF FILING PRÆCIPE—Filed September 9, 1936

To Joseph Trimer Corporation and Moses, Kennedy, Stein & Bachrach, 231 S. LaSalle Street, Chicago, Illinois, Counsel for Appellee:

Pursuant to Paragraph 2 of Rule 10 of the Rules of the Supreme Court of the United States, we hand you a copy of appellant's præcipe for a transcript of record in the above entitled cause, to be prepared by the Clerk of the Supreme Court of Illinois, the original of which præcipe we shall file with said Clerk of the Supreme Court of Illinois on September 9th, 1936.

Nicholas J. Pritzker, J. Herzl Segal, Stanford Clinton, Attorneys for Appellant.

Received a copy of the above notice and of the appellant's præcipe for transcript of record therein referred to, this 5th day of September, 1936.

Joseph Triner Corporation, a Corporation, by Moses, Kennedy, Stein & Bachrach, Its Attorneys.

[fol. 75½] [File endorsement omitted.]

[fols. 76 & 77] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 78] Certificate of transmittal omitted in printing.

[fol. 79] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF THE POINTS ON WHICH HE INTENDS TO RELY AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed September 17, 1936

To Honorable Charles Elmore Cropley, Clerk of the Supreme Court of the United States, Washington, D. C.:

Pursuant to Rule 13 Paragraph 9 of the Rules of the Supreme Court of the United States, the appellant comes now

and adopts his assignments of error as his statement of the points to be relied upon and represents that the whole of the record as filed is necessary for the consideration of the case.

Nicholas J. Pritzker, Stanford Clinton, J. Herzl Segal.

Received a copy of the above document this 10th day of September, 1936.

Joseph Triner Corporation, a Corporation, by Moses, Kennedy, Stein & Backrach, Its Attorneys.

[fol. 80] [File endorsement omitted.]

Endorsed on cover: File No. 40,912. Illinois Supreme Court. Term No. 372. Carl W. McNeil, doing business as McNeil's Liquor Store, appellant, vs. Joseph Triner Corporation. Filed September 17, 1936. Term No. 372, O. T., 1936.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 372

JOSEPH TRINER CORPORATION, A CORPORATION,
(Plaintiff) Appellee,

vs.

CARL W. McNEIL, DOING BUSINESS AS McNEIL'S LIQUOR STORE,
(Defendant) Appellant.

APPEAL FROM THE SUPREME COURT OF ILLINOIS (NO. 23475); THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

Honorable BENJAMIN P. EPSTEIN, Judge Presiding.

Statement of Jurisdictional Facts.

Pursuant to Rule 12, Paragraph 1, of the Rules of the Supreme Court of the United States, Carl W. McNeil, doing business as McNeil's Liquor Store, appellant in the above entitled cause, presents the following statement particularly disclosing the basis upon which appellant contends

that the Supreme Court of the United States has jurisdiction upon appeal to review the decree of the Supreme Court of the State of Illinois appealed from herein:

(a) The Statutory Provisions Believed to Sustain the Jurisdiction.

Section 237 (a) of the Judicial Code of the United States (28 U. S. C. A., Section 344) provides:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State on the ground of it being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court and may in its discretion, award execution or remand the cause to the court from which it was removed by writ."

Sections 861 (a) and 861 (b) of the U. S. C., Title 28, provide as follows:

> "861 (a) The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.
>
> 861 (b) The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief including the provisions relating to costs, supersedeas and mandate, shall be applicable to the appeal which Section 861 (a) of this title substitutes for a writ of error."

(b) The Statute of the State of Illinois, the Validity of Which is Involved.

The statute of the State of Illinois, the validity of which is involved, is known and cited as the "Fair Trade Act", may be found in Smith-Hurd Revised Statutes, 1935, Chapter 121½, Section 188, *et seq.*, and in Illinois State Bar Statutes, 1935, Chapter 140, Section 8, *et seq.*, and is in words and figures as follows, to wit:

"An Act to Protect Trade Mark Owners, Distributors and the Public Against Injurious and Uneconomic Practices in the Distribution of Articles of Standard Quality Under a Trade Mark, Brand or Name.

Be it Enacted by the People of the State of Illinois Represented in the General Assembly:

SECTION 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity; provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice stock price; at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

SECTION 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

SECTION 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

SECTION 4. This Act may be known and cited as the "Fair Trade Act."

(c) The Date of Decree Sought to be Reviewed.

By its opinion delivered on the 10th day of June, 1936, the Supreme Court of Illinois affirmed the decree of the Circuit Court of Cook County, Illinois. Appellant filed no petition for rehearing within the time allowed by the rules of the Supreme Court of Illinois and therefore the decree became final on said 10th day of June, 1936. Application for appeal is presented herewith by the petition for leave to appeal this 26th day of August, 1936, within three months after the said 10th day of June, 1936, when said decree became final.

(d) Nature of Case, Rulings of the Court and Cases Believed to Sustain Jurisdiction.

The appellee filed its complaint herein on November 8, 1935, seeking an injunction against the appellant to restrain him from wilfully advertising for sale, offering to sell or selling whiskey below a uniform price established by the appellee in contracts with various third parties other than the appellant, pursuant to the Illinois Fair Trade Act hereinbefore quoted in full. Upon the application of the appellee an order was entered on November 16, 1935, directing the issuance of a temporary injunction. Thereafter the appellant filed his written motion to dissolve the temporary injunction and to dismiss the complaint for want of equity on the ground that it was substantially insufficient in law. The motion to dismiss specifically raised the point that the Fair Trade Act violated the Federal Constitution.

The complaint alleges in substance: The plaintiff is a corporation engaged in business in the City of Chicago, Illinois, as a wholesale distributor selling to retailers for resale in that city various brands of liquors and alcoholic beverages of standard quality. The defendant is a retailer, engaged in said City in selling various brands of liquor and alcoholic beverages at retail (Abst. 1-2). The plaintiff sells at wholesale to retailers of said City certain liquors and alcoholic beverages commonly known as "Schenley Products" which it purchases from a New York corporation, Schenley Distributors, Inc., which is licensed to do business in the State of Illinois, and is the sole sales and distributing agent of certain affiliated liquor distilleries known as the Schenley Distilleries. The plaintiff is one of ten wholesalers of Schenley products in the City of Chicago who are known as "local Schenley distributors" (Abst. 2). These local Schenley distributors are limited to that

number and are the only ones selling Schenley Products at wholesale in the City of Chicago.

The plaintiff has a considerable financial investment in its business. An important and valuable asset of said business is the good will of the retailers who purchase Schenley products from the plaintiff, and of the public and consumers who purchase said products in Chicago. The good will has been built up in part by the maintenance by local Schenley distributors and Schenley Distributors, Inc., of a uniform retail price for their products (Abst. 3-4). Schenley products consist of various brands of straight whiskeys, blended whiskeys, bonded whiskeys, gins, brandies, cordials, and rums. All of said brands at all times have been and are of standard quality or make. All of said brands are sold in bottles which have affixed thereon a paper label bearing the trade-mark, duly registered with the United States Patent Office, of the producer of the product and the brand and name of the producer (Abst. 4-5). One of said brands is known as "Old Quaker". Said brand of "Old Quaker" is in fair and open competition with commodities of the same general class sold at retail in said City, produced by persons other than said Schenley Distilleries (Abst. 5-6).

The complaint alleges in some detail the peculiar characteristics of the market in liquor and alcoholic beverages and sets forth the beneficial effects of the maintenance of uniform prices of liquors and the evil effects of price cutting (Abst. 6-9). In view of the position taken by the defendant that the statute under which this action is brought is invalid, we consider it purposeless to go more fully into this portion of the complaint.

Schenley Distributors, Inc., adheres to a business policy of securing to consumers a uniform and standard retail price fixed at an amount fair and reasonable to manufacturer, distributor and consumer for each brand of

Schenley products sold in Chicago. The uniform and standard retail price for the brand known as "Old Quaker" is $1.89 per quart, 98¢ per pint and 50¢ per one-half pint. Schenley Distributors, Inc., in accordance with said business policy, suggests to the plaintiff and other local Schenley distributors a minimum retail price for which each of its brands should be sold at retail. In the event any distributor sells any brand of Schenley products to any retailer who is known by said distributor to sell any brand of Schenley products in Chicago at less than the uniform retail price suggested, Schenley Distributors, Inc., refuses to sell said products to said distributor (Abst. 11-12).

After the enactment of the Fair Trade Act (which is alleged in the complaint in *haec verba*) (Abst. 9-10), the plaintiff, to avail itself of the benefits of the act, entered into various contracts with retailers, which contracts contain a provision that said retailers would not resell said brands except at the prevailing uniform and standard Schenley retail price. During the five months preceding the institution of suit, all sales of Schenley Products made by plaintiff to retailers were made under such contracts.. Defendant knew of these contracts at the time that he engaged in the conduct hereinafter described. The other local Schenley distributors similarly entered into like contracts with their retailers, and the number of all retailers in Chicago selling under such contracts approximated 85% of all retailers selling Schenley products in that city. As a result of the foregoing business policy certain beneficial consequences are alleged to have ensued (Abst. 12-15). We do not consider it material to describe these at length.

During the month of October, 1935, the defendant, Carl W. McNeil, threatened to sell, offer for sale and advertise for sale, the brand of whiskey known as "Old Quaker" at a price lower than the stipulated uniform standard Schenley retail price. At the time of making such threats the

defendant knew of the existing contracts to maintain the price of said brand. On October 16, 1935, the plaintiff informed the defendant of the business policy of the plaintiff and of its attempts to avail itself of the benefits of the Fair Trade Act by entering into said agreements, and requested the defendant not to sell, offer for sale or advertise for sale at retail in Chicago said brand of "Old Quaker" below the uniform price. The plaintiff tendered to the defendant a form of printed agreement which it used in making sales of Schenley products to other retailers. Said form of printed agreement is attached to the complaint as an exhibit (Abst. 24-25). The defendant refused to enter into such an agreement (Abst. 15-17).

On October 18, 1935, the defendant sold large quantities of the brand of "Old Quaker" at 77¢ per pint (the uniform price whereof was then 98¢ per pint) said defendant knowing at the time of the various contracts stipulating the uniform retail price. Thereafter the defendant was requested by plaintiff to cease underselling the uniform price, but the defendant asserted that he would not refrain from so doing (Abst. 17-18). As a result of the defendant's conduct a great number of other retailers located in the vicinity of the defendant's store threatened to violate their contracts with the plaintiff and to sell and offer for sale said brand of "Old Quaker" at the price of 77¢ or less per pint in order to meet competition. Several of the retailers did violate their contracts. The sales by said retailers at said price of 77¢ and below, it is alleged, did not yield said retailers a fair and reasonable profit and some of the retailers began to and did offer to the public substitute brands for "Old Quaker" when the public called for that brand. The plaintiff consequently suffered great loss and irreparable injury (Abst. 18).

On November 8, 1935, the defendant again offered to sell, advertised for sale and sold "Old Quaker" at 77¢ per

pint. On that day the defendant displayed in the front window of his store bottles bearing the trade name and trade mark of "Old Quaker" and attached to the pane of said window, signs advertising said brand at 77¢ per pint. The uniform price was then 98¢ per pint, and defendant knew that (Abst. 19).

All of the quantity of "Old Quaker" sold by defendant was purchased by the defendant from various persons within the State of Illinois who kept and had said quantity in stock in said State prior to selling same to said defendant. Said quantity so purchased by the defendant was purchased subsequent to the time when said Fair Trade agreements were entered into by the plaintiff and subsequent to the time that said defendant knew of the standard and uniform price for said brand fixed in said agreements. Said whiskey was not dealt in by defendant for the purpose of or in the course of closing out said quantity of said brand for the purpose of discontinuing delivery of said brand nor because said quantity nor any part thereof was damaged or deteriorated nor on account of or pursuant to an order of court (Abst. 20).

The complaint alleges that unless the defendant is restrained from selling below the uniform price great and irreparable injury to the plaintiff will result. The injury is specifically set forth. The amount of compensation which would afford relief to the plaintiff is alleged to be difficult of ascertainment. An injunction against the defendant is accordingly prayed (Abst. 21-22).

The motion of the appellant for a decree dismissing the complaint for want of equity on the ground that the complaint is substantially insufficient in law raises the sole objection that the Fair Trade Act is unconstitutional (Abst. 29). The following specific Federal constitutional objections were raised: (a) it violates the due process clause of the Fourteenth Amendment to the Federal Constitution in

that its provisions, terms and language are so incomplete, vague, indefinite and uncertain that the Act does not express clearly or intelligibly the subject matter attempted to be covered and the acts permitted, required or forbidden to be done thereunder, and provides for arbitrary classification of persons (Abst. 30); (b) it violates the Fourteenth Amendment to the Federal Constitution by denying to the defendant the equal protection of the laws.

The trial court held the statute constitutional and overruled the motion for a decree dismissing the complaint for want of equity. The appellant elected to abide by his motion and accordingly a final decree was entered granting a permanent injunction as prayed for in the complaint. Since the validity of a statute was involved an appeal was taken directly to the Supreme Court of Illinois. The Supreme Court of Illinois affirmed the decree of the trial court and refused to sustain the various points urged by appellant challenging the constitutionality of the Fair Trade Act. As appears from the opinion of the Supreme Court of Illinois (363 Ill. 559) the constitutional questions were specifically and directly considered and passed upon by the court. Thus on page 567 the court said:

> "The contention is made that the Fair Trade Act violates the equal protection of the laws provision of the Fourteenth Amendment to the Federal Constitution, the due process clauses of the Federal and State Constitutions, and also Section 12 of Article IV of the State Constitution."

Again on page 569 the court said:

> "The defendant maintains that Section 2 of the Fair Trade Act arbitrarlly deprives him of his right to determine the price at which he will sell his commodities and in consequence violates the due process clauses of the Federal and State Constitutions."

Also on page 575 the court said:

> "The defendant argues, however, that the Fair Trade Act creates an arbitrary classification of persons and grants to such persons special privileges and immunities in contravention of the constitutional guaranties invoked."

By its decision the Supreme Court of Illinois overruled all of the foregoing objections raised by appellant and sustained the validity of the Fair Trade Act.

The following are a few of the many cases in which the Supreme Court of the United States has recognized its jurisdiction to review decisions of the courts of last resort of the several States, which decisions of the State courts sustain the validity of State statutes against attack on the grounds that they violated the Constitution of the United States:

Tyson v. *Banton,* 273 U. S. 418 (which involved a statute fixing the price of theatre tickets) and cases therein cited;

Fairmont Co. v. *Minnesota,* 274 U. S. 1 (which involved a statute controlling the price of dairy products) and cases therein cited;

Wolff Co. v. *Industrial Board,* 262 U. S. 522 (which involved the regulation and fixing of wages);

Williams v. *Standard Oil Co.,* 278 U. S. 235 (which involved a statute fixing the price of gasoline) and cases therein cited;

Ribnik v. *McBride,* 277 U. S. 350 (which involved a statute regulating the fees of employment agencies) and cases therein cited;

Nebbia v. *New York,* 291 U. S. 502 (which involved a statute fixing the price of milk).

The effect of the Illinois Fair Trade Act is to permit the fixing of resale prices of commodities bearing a trade-mark, brand or name by the owners, vendors and vendees thereof.

No restraints whatsoever are placed upon the action of these private persons in fixing resale prices. *They have the power, without the consent of the appellant and in the teeth of his expressed protest, to exact such resale prices as they in their unlimited discretion may determine.* Substantial charges of unreasonable, discriminatory and unjust classification of persons are levelled at the statute in question; charges of ambiguity, uncertainty and indefiniteness in the terms of the statute are raised, and most important of all, the charge is made that the appellant and his property by virtue of the Fair Trade Act are bound and controlled by the actions of others, however arbitrary and unreasonable, without his consent and without opportunity to be heard at any time before any judicial or legislative tribunal. It is manifest that these charges are serious and require consideration by this Court to determine whether or not a statute containing such drastic grant of powers and phrased as this statute is phrased has properly been declared free from repugnancy to the Constitution of the United States. That these charges are earnestly made and raise serious questions of validity of the statute is apparent from the extended and deliberate consideration accorded these charges by the Supreme Court of Illinois. No stronger evidence of the substantial and serious nature of the questions involved is needed than the opinion of the Court itself (363 Ill. 559).

The final decree entered herein is a judgment in the highest court of Illinois in which a decision in the suit can be had and there is drawn in question in said suit the validity of a statute of the State of Illinois on the ground of its being repugnant to the Constitution of the United States. The decision of the Supreme Court of the State of Illinois was in favor of its validity and therefore under the Judicial Code of the United States in effect prior to January 31, 1928, the appellant would have been entitled to have said

judgment reviewed by the Supreme Court of the United States on writ of error. Under the Act of January 31, 1928 as amended April 26, 1928 (28 U. S. C. A. Sections 861 (a) and 861 (b)) the present appeal is a substitute for the review by writ of error existing as a matter of right prior to January 31, 1928.

For all of the foregoing reasons it is respectfully submitted that a substantial Federal constitutional question is presented for decision in this cause and an appeal lies as a matter of right from the decree of the Supreme Court of the State of Illinois to the Supreme Court of the United States.

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J. HERZL SEGAL,
STANFORD CLINTON,
Attorneys for Appellant.

Dated August 26, 1936.

EXHIBIT "A".

Docket 23475. Agenda 27.

APRIL TERM, 1936.

JOSEPH TRINER CORPORATION, *a Corporation, Appellee,*

vs.

CARL W. MCNEIL, *Doing Business as McNeil's Liquor Store, Appellant.*

Appeal from the Circuit Court of Cook County.

Mr. Justice WILSON delivered the opinion of the court:

This is a proceeding instituted by the plaintiff seeking relief under the provisions of the Fair Trade act approved July 8, 1935. (Ill. State Bar Stat. 1935, p. 3091; Smith's Stat. 1935, p. 2893.) The title of the statute expresses its purpose as "An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name." Section 1 provides: "Sec. 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

"(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

"Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

"(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity; provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

"(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

"(3) By any officer acting under the orders of any court."

There appears to be no serious contention that the act, up to this point, is invalid and unenforcible. We are particularly concerned with section 2 which declares that "wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

The third section provides that the act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. The Fair Trade act thus permits vertical resale price maintenance but condemns, as to the Federal and State Anti-trust laws, horizontal arrangements for fixing prices. The act prescribes no criminal penalties.

The facts upon which this action is predicated are not in dispute. Schenley Distributors, Inc., licensed to transact business in Illinois, is the sole sales agent and representative in this State for certain liquors and alcoholic beverages manufactured by several affiliated distilleries known as the Schenley distilleries. "Old Quaker" is the brand name of one of the Schenley products and the name has been duly registered as a trademark with the United States patent office. Affixed to each bottle of "Old Quaker" is a distinc-

notice thereof, so as to make resale price maintenance contracts binding as against third persons with notice. The rule was applied in *DeMattos* v. *Gibson,* 4 DeG. & J., 276 (1858), 45 Eng. Rep. 108, in granting specific performance to the charterer against the ship owner and a mortgagee who had taken the mortgage with notice of the charter party. This decision was followed by the Privy Council in *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (1926), A. C. 108, and the principle of *Tulk* v. *Moxhay* was again applied in an action to enforce a charter party against a subsequent purchaser of a ship. The Illinois Supreme Court has uniformly followed the rule of *Tulk* v. *Moxhay* and has enforced restrictions on the use of land as against purchasers with notice in accordance with the rule of that case. *Frye* v. *Partridge,* 82 Ill. 267, 270 (1878), *Wiegman* v. *Kusel,* 270 Ill. 520, 522, 110 N. E. 884 (1915); *Brandenburg* v. *Country Club Building Corp.,* 332 Ill. 136, 145, 163 N. E. 440 (1928); *O'Neill* v. *Wolf,* 338 Ill. 508, 515, 170 N. E. 669 (1930).

This court has in an analogous situation recognized the enforcibility of an equitable lien on personal property as against third persons with notice, as in *Walker* v. *Brown,* 165 U. S. 654 (1897), followed in *Aldrich* v. *Ederer Co.,* 302 Ill. 391, 395, 134 N. E. 726 (1922).

If it be insisted that there must be a dominant tenement in order that an equitable servitude be created, the business of plaintiff clearly satisfies such requirement. (See 36 Harvard Law Review, 107, 1922.)

In view of the foregoing precedents, a court, even in the absence of legislation such as Section 2 of the

Illinois Fair Trade Act, might hold that Fair Trade contracts valid under Section 1 of the Act are binding in equity as against third persons acquiring the goods in question with notice of such contracts. As stated in Chafee, *Equitable Servitudes on Chattels,* 41 Harvard Law Review, 945, 987. (1928) "the doctrine of equitable servitudes is a legitimate tool in the judicial equipment ready for use when desirable." The legislature has determined the desirability of utilizing this doctrine so far as resale price maintenance contracts are concerned, and it is clear under the authorities that in so doing the legislature has not violated any constitutional rights of defendant. Surely defendant cannot contend that he is deprived of property without due process of law where, as in this case, the property is acquired by defendant with notice of the restrictions to which it has necessarily been subjected. As stated by Lurton, J., in *Jones* v. *Great Southern Fireproof Hotel Co.*, 86 Fed. 370, 388 (C. C. A. 6th, 1898), in upholding a statute providing for mechanics' liens in favor of subcontractors:

> "Neither can the owner be said to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows what the law is and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of law. *Provident Inst. for Savings* v. *Jersey City,* 113 U. S. 506, 514 (1885) * * *."

This opinion was adopted by this Court in *Great Southern Fireproof Hotel Co.* v. *Jones,* 193 U. S. 532, 550 (1904). See also: *Sperry & Hutchinson Co.*

v. *Rhodes,* 220 U. S. 502 (1911), upholding a New York statute prohibiting the use of a person's picture for advertising purposes without his written consent.

Since it is apparent that the legal title which defendant asserts in Seagram products is necessarily subject to the restrictions contained in the admittedly valid distributor's contracts, the defendant cannot maintain that it is deprived of property without due process of law. (See *Bitterman* v. *L. & N. R. R. Co.* 207 U. S. 205, 222 (1907), 13 New York University L. Q. Rev. 267, 272, 275 (1936). In this connection, it should be noted that the Fair Trade Act in requiring actual notice is less onerous than recording acts to which third persons are bound, irrespective of actual notice, and as to which there can be no question of constitutionality.

4. The Act is a proper exercise of the police power of the State.

(a) The control of the economic evil of price-cutting is a proper subject for state legislation.

Defendant's contention that it has the inherent right to sell Seagram products free of restrictions, irrespective of the restrictions imposed thereon pursuant to the Fair Trade Act, because it claims to have had such absolute right before its enactment, ignores the fact that the defendant cannot claim a vested right in the common law or public policy which may have existed prior to the enactment of the statute. *Second Employers' Liability Cases,* 223 U. S. 1, 50 (1911); *New York Central Railroad Co.* v. *White,* 243 U. S. 188, 198 (1917); *Arizona Employers' Liability Cases,* 250 U. S. 400, 420 (1919). There

are innumerable instances where this court has held that legislation imposing new obligations and responsibilities does not violate the due process clause of the Fourteenth Amendment. *Pizitz Dry Goods Co.* v. *Yeldell,* 274 U. S. 112, 115 (1927); *Chicago* v. *Sturges,* 222 U. S. 313 (1911); *Noble State Bank* v. *Haskell,* 219 U. S. 104, 113 (1911); *Chicago & Alton Railroad Co.* v. *Tranbarger,* 238 U. S. 67, 76 (1915); *Sperry & Hutchinson Co.* v. *Rhodes,* 220 U. S. 502 (1911); *Arizona Employers' Liability Cases,* 250 U. S. 400 (1919); *New York Central Railroad Co.* v. *White,* 243 U. S. 188 (1917). It is also beyond question that the enactment of statutes for the protection of the owners of trade-marks, brands and names is a proper subject of state legislation. *American Trading Co.* v. *Heacock,* 285 U. S. 247, 258 (1932); *United Drug Company* v. *Rectanus Company,* 248 U. S. 90, 98 (1918); *Trade-Mark Cases,* 100 U. S. 82, 93 (1879).

The Fair Trade Act prevents the defendant from asserting an absolute right to sell Seagram products under the Seagram name in a manner which the legislature has declared to be uneconomic and injurious to the public, to the plaintiff and to others interested in the distribution of said products. In its exercise of the police power, the Illinois legislature has provided for resale price maintenance as means of curbing the economic evil of price-cutting because, in its judgment, such protection of the public and property rights in names, brands and trade-marks was "held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Noble State Bank* v. *Haskell,* 219 U. S. 104, 113 (1911). This Court has repeatedly held that there is no absolute freedom to do as one wills or to contract as one chooses; that

liberty of contract is a qualified and not an absolute right; and that liberty implies the absence of arbitrary restraint and not an immunity from reasonable regulations and prohibitions imposed in the interests of the community.

The numerous decisions of this court sustaining the validity of statutes involving the exercise of the police power have often been mentioned.* The restraint or interference which the defendant asserts it was subjected to by the Fair Trade Act is much less drastic than the curtailment of liberty of contract and property, held valid by this Court in the cases referred to, and the principles applied in such cases support the validity of the Fair Trade Act as a proper exercise of the police power.

Defendant's claim that the Fair Trade Act is invalid because it benefits producers and distributors of branded articles, presents no valid constitutional objection to the Statute. The fact that the claimed infringement of the defendant's rights may benefit a particular class of persons will not invalidate the statute if in the judgment of the legislature it is considered necessary to promote the general welfare. The preponderant public opinion required the legislature to make a choice between the interests of persons selling articles under trade-marks, brands and names, as against the unrestricted freedom of vendees of such merchandise to resell the same free of all restrictions. Where a state legislature is required, in order to promote the general wel-

* *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 567, 568 (1911); opinion of Mr. Justice Stone in *Tyson* v. *Banton*, 273 U. S. 418, 452, 453; *Nebbia* v. *New York*, 291 U. S. 502, 525 (1934); and opinion of the Chief Justice in *Morehead* v. *People of the State of New York*, 298 U. S. ....., 56 S. Ct. 918, 930 (1936).

fare, to make a choice between conflicting property rights, resulting in the preferment of one right over another, the fact that certain individuals derive immediate benefits from such preferment, does not render the exercise of the police power invalid. *Miller* v. *Schoene*, 276 U. S. 272 (1928); *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110 (1911); *Offield* v. *N. Y. N. H. & H. R. R. Co.*, 203 U. S. 372, 377 (1906).

(b) The operation and effect of the Act is not unreasonable, arbitrary or capricious and the Act is reasonably designed to carry out its purpose.

In considering the reasonableness of the method adopted by the legislature to curb the economic evil of price-cutting, it should be observed that the only remedy provided for by the statute is judicial relief for the protection of any person actually damaged thereby, and that the defendant is given the opportunity to be heard and to urge any legal or equitable defense * which it may have. Under such circumstances, it "amounts to a contradiction of terms to say that in submitting the matter to the Courts, there is a denial of due process." *Arizona Employers' Liability Cases*, 250 U. S. 400, 426 (1919). In addition, the relief accorded by courts in the absence of statutes in situations analogous to those provided for by the Act demonstrate that it is not unreasonable, arbitrary or capricious in its operation and effect, and that it is reasonably designed to accomplish its purpose. *Montana Company* v. *St. Louis Mining & Milling Co.*, 152 U. S. 160, 169 (1894). The situations to

* Section 43 of the Civil Practice Act of Illinois provides that a defendant may in all actions plead equitable as well as legal defenses. (Ill. State Bar Stat. 1935, Ch. 110, ¶ 171, Laws of Illinois 1933, pp. 784, 795.)

which we refer include the cases recognizing the validity of equitable servitudes on property, already discussed at p. 20, *et seq.* of this brief, the cases granting equitable relief against interference with contract relations, and cases granting equitable relief against unfair competition.

The courts have held, even in the absence of statute, that equity will restrain a third person from wilfully and knowingly interfering with or participating in breaches of contracts to the irreparable injury of a party thereto. In *Angle* v. *Chicago, St. Paul etc. Ry. Co.*, 151 U. S. 1 (1894), this court held that an actionable wrong is committed by one who "maliciously interferes in a contract between two parties and induces one of them to break that contract to the injury of the other", and granted equitable relief. In *Bitterman* v. *L. & N. R. R. Co.*, 207 U. S. 205 (1907), this court held that it was not necessary that actual malice in the sense of personal ill will should appear but that a wanton disregard of contract rights constituted legal malice within the doctrine of the *Angle* case, and restrained defendant from dealing in nontransferable railroad tickets acquired by defendant with knowledge of such nontransferability. In *Wells & Richardson Co.* v. *Abraham*, 146 Fed. 190 (C. C. N. Y. 1906), affirmed 149 Fed. 408 (C. C. A. 2d, 1906), although the court stated that it considered resale price maintenance contracts generally not binding upon third persons, it granted equitable relief where the third person was a party to the breach of such contracts with a wholesale distributor. See also *Dr. Miles Medical Co.* v. *Jaynes Drug Co.*, 149 Fed. 838 (C. C. Mass. 1906). Authorities on the general question are discussed in Carpenter, *Interference with Contract Relations*, 41 Harvard Law Review 728

(1928); Sayre, *Inducing Breach of Contract*, 36 Harvard Law Review 663 (1923); and in 84 A. L. R. 43, 52 (1933).*

The courts have also held, even in the absence of statute, that where defendant by deception wilfully and knowingly interferes with contracts to the irreparable injury of a party thereto, such conduct will be restrained by a court of equity. *Garst* v. *Charles*, 187 Mass. 144, 72 N. E. 839 (1905); *National Phonograph Company, Limited* v. *Edison-Bell Consolidated Phonograph Company, Limited* (1908), 1 L. R. Ch. Div. 335. In view of the foregoing precedents in analagous situations, we submit that there is no force to defendant's contention that the statutory application of the principles therein enunciated is unreasonable, arbitrary or capricious, or irrelevant to the legislative purpose.

This Court has observed that the doctrine of unfair competition is a creature of a court of equity and that the right to equitable relief is not confined to cases of palming off goods as those of another. *International News Service* v. *Associated Press*, 248 U. S. 215, 241 (1918), followed in *Fisher* v. *Star Co.*, 231 N. Y. 414, 132 N. E. 133, 137 (1921). In Nims, *Unfair Competition and Trade Marks*, (3d Ed.

* Although we have merely referred to this theory of relief as an analogy supporting the reasonableness of the Act, we respectfully submit that it may be considered a basis for the affirmance by the Supreme Court of Illinois of the trial court's decree. The court stated in 363 Ill. 610, 611, 612 (R. 106, 108), that "defendant was a party to breaches of other Fair Trade Contracts between plaintiff and certain distributors * * * We are of the opinion that the Fair Trade Act is valid and that under the facts in this record plaintiff was entitled to equitable relief by injunction."

1929) p. 36, the author traces the development of unfair competition and concludes (p. 37) that "the nature of the act of passing off has not changed, but our ideas of what is fair, have changed. To such changes the equity judge must necessarily be sensitive." As has been demonstrated by the facts in this case, price cutting is seriously injurious to, if not completely destructive of the good-will of the owner of the trademark, brand or name or of the distributor of the products sold thereunder. The protection of such good-will is the primary reason for granting relief in unfair competition cases. Nims, *Unfair Competition and Trade Marks,* 3rd Ed. pp. 50-52. It is thus apparent, that relief against price cutting is peculiarly within the jurisdiction of a court of equity in unfair competition cases. It has therefore been suggested that equitable relief against price-cutting is but a natural development of the law of unfair competition. See Rogers, *Predatory Price Cutting as Unfair Trade,* 27 Harvard Law Review, 139, 154 (1913), and also Seligman and Love, *Price Cutting and Price Maintenance,* p. 276 (1932). The availability of equitable relief for the protection of names and good will inherent in such names is shown even in cases where no competition of any kind was involved. *Wall* v. *Rolls-Royce of America, Inc.,* 4 Fed. (2d) 333 (C. C. A. 3rd, 1925); *Vogue Company* v. *Thompson-Hudson Company,* 300 Fed. 509 (C. C. A. 6th, 1924); *Yale Electric Corp.* v. *Robertson,* 26 Fed. (2d) 972 (C. C. A. 2d, 1928); *L. E. Waterman Co.* v. *Gordon,* 72 Fed. (2d) 272, (C. C. A. 2d, 1934). In view of the foregoing authorities, it can not be said that the Fair Trade Act as a logical development of the doctrine of unfair competition is

so unreasonable as to constitute a violation of constitutional rights. The fact that the doctrine is a creature of a court of equity is an adequate assurance that it will not be administered arbitrarily.

Defendant's further contention on page 65 of its brief that the Act is unconstitutional because it is indefinite is without merit. This Court has stated, in disposing of such an objection under circumstances similar to those in the case at bar that "The objection of plaintiffs in error to the vagueness of the statute is without weight. The state court has held it to be applicable and that is enough when, by the statute, no penalty can be incurred or disadvantage suffered in advance of the judicial ascertainment of its applicability." *Miller* v. *Schoene*, 276 U. S. 272, 281 (1928); Cf. *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 69 (1911).

III.

The Act does not deny the defendant the equal protection of the laws in violation of the Fourteenth Amendment.

Defendant argues that the Act, in protecting owners of articles which are sold under trade-marks, names or brands, as distinguished from owners of articles sold without reference to any trademark, name or brand, establishes an arbitrary, discriminatory, unreasonable and unjust classification. Defendant, however, cannot assail the validity of the Fair Trade Act for this reason because it does not assert any right in this case to avail itself of the provisions of the Act in

connection with the distribution of articles not bearing the required identification. *Arkadelphia Milling Co.* v. *St. Louis, Southwestern Ry. Co.*, 249 U. S. 134, 149 (1919); *Darnell* v. *Indiana*, 226 U. S. 390 (1912). Moreover, there is in fact no discrimination under the Act. It applies to commodities bearing the "The trade-mark, brand or name of the producer or owner of such commodity", and it is readily apparent that the benefits of the Act are open to anyone who chooses to adopt such trade-marks, brands or names and utilize the same and bring himself within the scope of the Act. No one is deprived of the benefits of the Act merely because he may not be the owner of a trade-mark in the technical sense. In view of this general availability of the Act, defendant's contention is unfounded. *Perkins* v. *Heert*, 158 N. Y. 306; 53 N. E. 18 (1899); *Barrett* v. *Millikan*, 156 Ind. 510; 60 N. E. 310, 312 (1901).

Defendant's argument on this point further ignores the fact that price-cutting is harmful to the goodwill of the owner or distributor of articles sold under trade-marks, names or brands, *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144, 151 (1913); *Robert H. Ingersoll & Bro.* v. *Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030 (1917), 89 N. J. Eq. 332, 108 Atl. 128 (1918); See also, Rogers, *Predatory Price Cutting as Unfair Trade*, 27 Harvard Law Review, 139, 151 (1913). This goodwill naturally cannot exist in the case of articles not bearing any such identification or indicia of origin. This distinction clearly supports the reasonableness of the classification attacked by defendant in view of the many decisions of this Court recognizing the wide discretion given state legislatures in this regard. *Metropolitan Casualty Insurance Co. of N. Y.* v.

Brownell, 294 U. S. 580, 583 (1935); *Bayside Fish Flour Co.* v. *Gentry,* 297 U. S. 422, 429 (1936); *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209 (1934); *Lindsley* v. *National Carbonic Gas Co.,* 220 U. S. 61, 73 (1911). See also, *Borden's Farm Products Co.* v. *Ten Eyck,* 297 U. S. 251 (1936), upholding the validity of a differential in the price of milk established in favor of dealers not having a well advertised trade name.

Conclusion.

We respectfully submit that defendant was not deprived of its liberty or property without due process of law and was not denied the equal protection of the laws in violation of the Fourteenth Amendment, and that the judgment appealed from should be affirmed.

Respectfully submitted,

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APPENDIX.

REFERENCES.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 372

CARL W. McNEIL, DOING BUSINESS AS McNEIL'S LIQUOR STORE, APPELLANT,

vs.

JOSEPH TRINER CORPORATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

FILED SEPTEMBER 17, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 372

CARL W. McNEIL, DOING BUSINESS AS McNEIL'S LIQUOR STORE, APPELLANT,

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APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

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[fol. 2-1]

IN SUPREME COURT OF ILLINOIS

FEBRUARY TERM, A. D. 1936

Appeal from Circuit Court, Cook County

Honorable Benjamin P. Epstein, Judge Presiding

JOSEPH TRINER CORPORATION, a Corporation, Appellee,

vs.

CARL W. MCNEIL, Doing Business as McNeil's Liquor Store, Appellant

Abstract of Record—Filed January 15, 1936

Placita.

Complaint filed herein on November 8, 1935, in words and figures as follows:

COMPLAINT

Joseph Triner Corporation, a corporation, plaintiff, by Moses, Kennedy, Stein & Bachrach, its attorneys, complaining of Carl W. McNeil, doing business as McNeil's Liquor Store, defendant, respectfully shows to the court and alleges:

1. That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Illinois and is engaged, and at all times and time hereinafter mentioned was engaged, in business in the City of Chicago, State of Illinois, as a distributor, selling at wholesale to re-[fol. 2-2] tailers, for resale in said city, various brands of liquors and alcoholic beverages of standard quality.

2. That the defendant, Carl W. McNeil, under the name and style of McNeil's Liquor Store, is engaged in said city and for six months or more prior to the institution of this suit has been continuously engaged in selling various brands of liquor and alcoholic beverages to the general public for purposes of consumption.

3. That the plaintiff, Joseph Triner Corporation, a corporation, sells at wholesale to retailers for resale in said city, and at all times mentioned herein and for more than a year has so sold, certain liquors and alcoholic beverages commonly known, and hereinafter referred to as "Schenley Products"; that said Schenley Products are manufactured by certain affiliated distilleries generally known as the "Schenley distilleries"; that plaintiff purchases and has purchased in the State of Illinois all of the Schenley Products sold by it, and which it sells, from Schenley Distributors, Inc., a corporation organized and existing under and by virtue of the laws of the State of New York and duly qualified to do business in the State of Illinois; that said Schenley Distributors, Inc. is and at all times mentioned herein was, the sole and common sales agent in the State of Illinois of said Schenley distilleries; that said Schenley distilleries distribute and have distributed Schenley Products in the State of Illinois through said Schenley Distributors, Inc.

4. That said Schenley Distributors, Inc., itself does not sell, nor at any time or times mentioned herein has it sold, any material amount of Schenley Products to persons selling said Products at retail in said City of Chicago; that [fol. 2-3] said Schenley Products are sold to said retailers by certain wholesalers, like plaintiff, who purchase in the State of Illinois all of said Products from Schenley Distributors, Inc. and vessell same at wholesale to said retailers; that said wholesalers of Schenley Products are generally known to persons engaged in the liquor business in said city (and are hereinafter referred to) as the "local Schenley distributors"; that pursuant to a business policy of said Schenley Distributors, Inc., the number of said local Schenley distributors in said city is, and at all times and time mentioned herein has been, about ten; that plaintiff, Joseph Triner Corporation, a corporation, and the other local Schenley distributors in said city, sell and at all times and time mentioned herein have sold substantially all of the volume of Schenley Products sold to retailers in said city.

5. That the plaintiff, Joseph Triner Corporation, a corporation, enjoys, and at all times and time mentioned herein and for more than a year has enjoyed, an established, substantial and profitable business in its wholesaling of Schen-

ley Products for resale in said city; that it owns and uses a large office building, leases considerable warehouse space and employs a large staff of salesmen in the conduct of said business; that an important and valuable asset of said business at the present time and for sometime passed is and has been the good will of the retailers who purchase Schenley Products from plaintiff and sell same in said city, and of the public and consumers who purchase said Products in said city; that plaintiff has expended large sums of money in securing and maintaining said good will; that the good will of said retailers who purchase from plaintiff consists [fol. 2-4] and has consisted in their high regard for plaintiff and said Products, and their habit and willingness to buy Schenley Product sfrom plaintiff, to handle said Products in their stores and push the sales thereof; that such good will of plaintiff's retailer customers has been developed by the character of credit and merchandising policies followed by plaintiff during the course of its business in connection with the sale of said Products, and by its maintenance, and the maintenance of the other local Schenley distributors and Schenley Distributors, Inc., of certain business policies more specifically set forth hereafter for assuring retailers of Schenley Products in said city a continued and reasonable profit upon their retail sales through retail price uniformity; that the good will of said public and consumers who purchase Schenley Products in said city consists in their knowledge and ability to identify the various Schenley Products, in their knowledge of and ability to determine the relative value of the various Schenley Products as compared with each other and as compared with competing liquors, in the consequent high regard of said consumers and public for Schenley Products, and in the willingness and habit of large numbers of said public and consumers to purchase and repurchase said Products; that said good will of said public and consumers was created, in part, and has been and is retained, in part, by the maintenance of said business policies of plaintiff, the other local Schenley distributors and said Schenley Distributors, Inc., more specifically set forth hereafter for retail price uniformity.

6. That said Schenley Products consist of various brands of straight whiskeys, blended whiskeys, bonded whiskeys,

[fol. 2-5] gins, brandies, cordials and rums; that all of said brands and each of them are and is and at all times have and has been of standard quality or make; that each of said brands of said Schenley Products substantially differs in quality from each of the other of said brands and each of said brands is sold by retailers in said city to the public at a price different from the price that each of the other of said brands is sold, dependent in price upon the particular quality of said brand; that all of said brands and each of them are sold in bottles of standard size and content, each and all of which bottles has and have, and at all times had, affixed thereon a paper label bearing the trade-mark, duly registered with United States Patent Office, of the producer of the product, and the brand and name of said producer; that one of said brands of Schenley Products is and has been known to persons engaged in the liquor business and to the general public in said city by the trade-mark and brand name of "Old Quaker," (a facsimile of the label affixed to bottles containing said brand being attached hereto and marked Exhibit "A"); that said trade-mark and brand name "Old Quaker" distinguishes said brand of Schenley Products from competing liquors and alcoholic beverages sold in said city.

7. That each and all of said brands of Schenley Products aforesaid, including said brand of "Old Quaker," is and are and at all times was and were sold to the general public and consumers in said City of Chicago at a fair and reasonable retail price for such commodities; that each and all of said brands of Schenley Products so sold at retail in said city, including said brand of "Old Quaker" is and are and at all times mentioned herein was and were in fair and open competition with commodities of the same general [fol. 2-6] class sold at retail in said city produced by persons other than the Schenley distilleries above mentioned; that said brand of "Old Quaker" is and at all times mentioned herein was in open and fair competition in said city with approximately ten other brands of the same general class of commodity produced by others and sold in said city.

8. That the sale at retail of liquor and alcoholic beverages in this country is of not more than two years' duration; that the practice of retail selling which has grown up during said period and which prevails today consists of

sales to the consumer of particular trade-mark or trade-named brands of liquors and alcoholic beverages in bottles of various standardized volumes to the exclusion of sales in bulk; that as a result of the novelty of the market and said manner of selling only branded merchandise, the retail liquor sales business throughout the United States as well as in said City of Chicago is peculiarly and highly competitive; that great numbers of brands of diverse qualities produced by many different manufacturers, and sold to the consumer at greatly varying prices, appear and disappear in the market seeking the public taste; that hundreds of different competing brands of liquor and alcoholic beverages are being sold at retail in said City of Chicago at the present time; that because of the highly competitive character of said market and the number of brands sold there is great difficulty in distinguishing the relative value of the different brands, and manufacturers and distributors of liquors of standard and uniform quality bearing the trade-mark or brand or trade-name of the producer are confronted with the problem of establishing the identity, merit [fol. 2-7] and worth of their respective brands in the mind of the public and consumers; that said problem is rendered especially difficult by virtue of the fact of retailers engaging in uneconomic price-cutting and otherwise selling the same brand at various prices; that it is essential to said manufacturers and distributors of brands of uniform and standard quality bearing the trade-mark, brand or trade-name of the producer, as well as in the interest of the public and consumers, that said public and consumers identify said brands and their worth as compared with other brands; that the only satisfactory and feasible method for accomplishing such identification is by having the retail sale of any brand maintained at a uniform reasonable price for said brand throughout a particular market.

9. That after the commencement of the sale of liquors and alcoholic beverages in this country there arose, and since has existed, a practice among a few sellers of liquor at retail in said City of Chicago of selling, either from time to time or continuously, well-known trade-marked and standard brands of liquor, which theretofore have acquired wide-spread attention and public favor by reason of successful merchandising methods, extensive advertising,

standardized high quality and a reasonable uniform price, at prices conspicuously lower than the prices prevailing in said city for said brands and at a loss or scant return to said retailers in order to attract the public to their stores and sell other brands of liquor or general merchandise at prices made sufficiently high to meet said loss and assure a general profit; that said practice of price-cutting is uneconomic and injurious and has caused and causes irrepara- [fol. 2-8] ble damage and severe loss to the producer of the brands sold at the cut price, to the great number of the distributors thereof and to the consumer or public; that where in a particular community of said city price-cutting of such character by some retailer has occurred, its immediate effect was to force and compel other retailers doing business in the same community, in order to meet the competition, quickly to lower their own prices of whatever brand of liquor happened to be cut, either to the same cut price or to a still lower price, and to sell said brand at the lower price; that in a very short time the lower price or prices would spread from community to community of said city, and would generally prevail; that upon a cut or lower price becoming prevalent its usefulness as a medium for attracting customers to any particular retailer is lost and sales by all retailers at the cut price become profitless and uneconomic; that once the price of a brand is sold generally at a lower price, the original or higher price cannot be restored; that upon the general establishment of an uneconomic price-cutting retailers generally are compelled because of their inability to secure a fair and reasonable return or profit, to stop or diminish their sales of the brand whose price has been cut and to offer and sell to the public substituted brands upon which a profit is possible; that such substituted brands are generally private or unknown brands; that such substitution of new brands soon destroys or greatly contracts the market for the brand which has been substituted for, and the business of the producer of said brand and of the wholesale and retail distributors thereof, is irreparably injured; that the producer of said brand is compelled, if he can afford to do so, to create a new [fol. 2-9] trade-name and/or trade-mark for the brand whose market has been destroyed and to sell the new brand at a higher price than the original price of the old brand

because of attendant promotional cost and the public is compelled to pay the higher price.

10. That there is and has been in force in the State of Illinois an Act duly passed by the General Assembly and approved by the Governor of the State on July 8th, 1935, known and cited as the Fair Trade Act; that said Act provides as follows:

"An Act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name.

"Be it enacted by the People of the State of Illinois, represented in the General Assembly:

"Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such pur- [fol. 2-10] chaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity; provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

"Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

"Section 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

"Section 4. This Act may be known and cited as the 'Fair Trade Act.'"

[fol. 2-11] 11. That said Schenley Distributors, Inc., a corporation, adheres and at all times mentioned herein has adhered to a business or trade policy of securing to the general public or consumers in said City of Chicago a uniform and standard retail price fixed at an amount fair and reasonable to manufacturer, distributor and consumer for each brand of Schenley Products sold in said City of Chicago, including said brand of "Old Quaker" heretofore mentioned; that the said uniform and standard retail price prevailing at the present time and at all times and time mentioned herein for said brand of "Old Quaker" is and was $1.89 per quart, 98 (per pint and 50c per one-half pint; that said uniform and standard retail prices for said brands of Schenley Products and each of them including said brand of "Old Quaker" at all times were and are fair and reasonable to manufacturer, distributor and consumer.

12. That said Schenley Distributors, Inc., a corporation, in accordance with its said business or trade policy of securing to the public or consumers in said city a uniform and standard retail price for each of its brands, including said brand of "Old Quaker" has suggested and suggests from time to time to plaintiff and other local Schenley distributors of this city a minimum retail price for which each of its brands should be sold at retail in said city and has announced from time to time to plaintiff and said local Schenley distributors that it would not make further sales of Schenley Products to any of the local Schenley distributors who sold or sells said products, or any of them, to any retailer who is known by said distributor to sell any brand

of Schenley Products in said city at less than the uniform [fol. 2-12] and standard retail price for same so suggested by Schenley Distributors, Inc.; that said Schenley Distributors, Inc. upon learning that any of said local Schenley distributors have sold any brand of Schenley Products to such a retailer, has refused to continue selling and stopped selling said Products to said local Schenley distributor.

13. That after the enactment of said Fair Trade Act and during the three months preceding the institution of this suit the plaintiff, Joseph Triner Corporation, a corporation, to protect itself and the public against the injurious and uneconomic practices recognized by said Act, and to avail itself of the benefits of said Act, announced to its trade that it would not sell brands of Schenley Products to any retailer for resale at retail in the City of Chicago, except on the condition that said retailer would not undersell the uniform and standard Schenley retail price suggested by Schenley Distributors, Inc., and then prevailing for said brands; that all retailers would be given a fair and equal opportunity by plaintiff to purchase said brands of Schenley Products from it on the same condition; that during the three months preceding the institution of this suit and at all times and time therein, any and all sales of Schenley Products by plaintiff to retailers in said city were made under agreements of sale by plaintiff with each of said retailers containing a provision that said retailers would not resell at retail in said city the brands or brand of Schenley Products sold to said retailers by plaintiff except at the price stipulated by plaintiff in said provision, that is to say, except at the uniform and standard Schenley retail price then prevailing; that the existence of said business or [fol. 2-13] trade policy of plaintiff, and the promises of said retailers to plaintiff not to resell except at the price stipulated by plaintiff, that is to say, the uniform and standard Schenley retail price, were known to the defendant at the time he engaged in the conduct hereinafter set forth.

14. That after the enactment of said Fair Trade Act and during said three months preceding the institution of this suit each of the other local Schenley distributors in the City of Chicago announced to his respective trade that in order to secure protection for himself and the public against the injurious and uneconomic practices recognized

by said Act and to avail himself of the benefits of said Act, said distributor would not sell brands of Schenley Products to any retailer for resale at retail in said City of Chicago except on the condition that said retailer would not undersell the uniform and standard Schenley retail price suggested by Schenley Distributors, Inc. and then prevailing for said brands; that all retailers would be given a fair and equal opportunity to purchase said brands of Schenley Products from said distributor upon the same conditions; that during said three months each of said local Schenley distributors made all or substantially all his sales of Schenley Products to retail sellers in said city under agreements with said retailers containing a provision that said retailers would not resell at retail in said city any Schenley Products sold them by said local Schenley distributor except at the price stipulated by said local Schenley distributor in said agreements, that is to say, except at the uniform and standard Schenley retail price then prevailing for said product.

15. That as a consequence and direct result of the above-mentioned business or trade policies of Schenley Distrib-
[fol. 2-14] utors, Inc. and of the plaintiff and other local Schenley distributors, and of the undertakings of retailers as aforesaid not to sell below the standard and uniform Schenley retail price for Schenley Products, approximately 85% of the retailers of said Products in said City of Chicago maintain and at all times and time during the three months preceding the institution of this suit have maintained said standard and uniform retail price; that the maintenance of said standard and uniform retail price resulted in (a) an enhancement during said period of three months in the good will of the retailers, selling Schenley Products in said city, for the various brands of Schenley Products particularly said brand of "Old Quaker." Said retailers enjoy and at all times during said period enjoyed comparative immunity from injurious and uneconomic price-cutting of said brands by other retailers and were assured thereby of, and obtained during said period, and are now assured of and do obtain, a reasonable compensation for their services and the services of each of them as retail sellers of Schenley Products in said city. Said retailers of said city are willing and at all times during said period were willing to handle said Products and develop

the market therefor; (b) an enhancement during said period of three months in the good will of the public and consumers of liquor in said city for the various brands of Schenley Products particularly said brand of "Old Quaker." Wide-spread identification by the public and consumers in said city of the various brands of Schenley Products and especially of said brand of "Old Quaker," and wide-spread understanding by said public and consumers of the relative worth of said brands as compared with each other and with competing brands was attained [fol. 2-15] during said period and now exists. Public confidence in said liquors was retained during said period; (c) a substantial increase in the volume of sales in the Chicago market of Schenley Products during said period. Retailers in said city during said period more than doubled their volume of sales of Schenley Products and the sales by plaintiff and the other local Schenley distributors by said Products to said retailers was corresponding augmented; (d) the enjoyment by the manufacturers, local Schenley distributors and retailers in said city during said period and at the present time of a reasonable profit upon sales of Schenley Products; (e) an unobstructed sale in said city during said period of Schenley Products and a continued high quality in the Products sold because of increased volume of production.

16. That on various occasions in the month of October, 1935, the defendant, Carl L. McNeil, doing business in said City of Chicago as McNeil Liquor Store, threatened to sell, offer for sale and advertise for sale in said City the brand of Schenley Products known as "Old Quaker," heretofore described herein, at a price lower than the uniform standard Schenley retail price for said brand stipulated by the seller in the contracts of sale then existing between plaintiff and the other local Schenley distributors with substantially all of the retailers in said city as above set forth; that at the time and times of the making of said threats and prior thereto said defendant well knew of said stipulation and the price so stipulated and of the promises of said retailers not to resell at retail in said city said brand of "Old Quaker" below the uniform and standard Schenley retail price for said brand as fixed in said con- [fol. 2-16] tracts, and at said times and time also well knew that plaintiff and the other local Schenley distributors

had sold and were selling to said retailers in said City said brand of "Old Quaker" upon the agreement of said retailers as above set forth not to resell said brand sold to them below said uniform and standard Schenley retail price for same; that on or about October 16, 1935, plaintiff by its agent informed the defendant of the business or trade policy of plaintiff heretofore set forth and of the above stated business or trade policies of the other local Schenley distributors, and said agent informed the defendant of the intention of and acts done by plaintiff and said local Schenley distributors, heretofore set forth, to avail themselves of the benefits of the Fair Trade Act, and said agent informed the defendant of the provision of the said Fair Trade Act and of its pu pose and policy, and said agent informed said defendant of the irreparable injury to plaintiff which would ensue if defendant executed his threat and threats and sold said brand of "Old Quaker" at a price below the uniform and standard Schenley price for same, and said agent specifically informed the defendant of the existing undertakings of the retailers in said city, heretofore set forth, not to resell any Schenley Products at retail in said city below the uniform and standard Schenley price for same; and said agent requested the defendant not to sell, offer for sale or advertise for sale at retail in said city and Schenley Products including said brand of "Old Quaker" below said price and said agent informed the defendant of said price and that plaintiff would be willing to sell Schenley Products under an agreement with the defendant not to resell said Products at retail in said city below said uniform and standard Schenley re- [fol. 2-17] tail price for same and said agent tendered to said defendant a certain form of written agreement, attached hereto as Exhibit "B" and incorporated herein, which plaintiff used and uses in making sales of Schenley Products to retailers in said city and also otherwise offered to take any individual orders defendant wished to give plaintiff for any Schenley Product provided there was attached to the order, slips bearing a certain agreement in writing, a copy of which is attached hereto as Exhibit "C" and incorporated herein, said form of agreement likewise being then and ever since used by plaintiff in making sales of Schenley Products to retailers in said city; that said defendant then and there refused to enter into any such

agreement or give such orders or otherwise undertake or state that he would not execute his threat or threats.

17. That on or about October 18, 1935 the defendant, Carl L. McNeil, doing business as McNeil's Liquor Store, offered to sell and sold on the premises of said store at, to-wit, 3144 West Irving Park Boulevard, Chicago, Illinois, large quantities of said brand of "Old Quaker" at the price of 77c per pint; that at the time of said offer for sale and sales, the said defendant well knew of the contracts and agreements of plaintiff and the other local Schenley distributors with the retailers of said city entered into pursuant to the Fair Trade Act as above set forth not to sell below the uniform and standard Schenley retail price for same stipulated by the seller in said contracts, and that said retailers and each of them were then and there selling in said city said brand of "Old Quaker" pursuant to said stipulation at not less than 98c per pint.

[fol. 2-18] 18. That thereafter the defendant was requested by an agent of the plaintiff to cease underselling the price so fixed in the various Fair Trade Agreements as above set forth but the defendant stated that he would not comply therewith and stated that he intended to undersell at retail in said city from time to time as he pleased the uniform and standard Schenley retail price for said brand of "Old Quaker" as fixed in said Fair Trade Contracts and threatened so to do.

19. That as result of said offer to sell and sales of the defendant a great number of the other retailers in the community of said city where said store of defendant was located threatened to violate their contracts with plaintiff and the other local Schenley distributors and to sell and offer for sale said brand of "Old Quaker" at the price of 77c or less per pint in order to meet said competition although the uniform and standard price for said brand then fixed in said contracts was 98c per pint; that several of said retailers did so violate their contracts and threatened to do so; that the sales by said retailers at said price of 77c and below did not yield said retailers a fair and reasonable profit and some of said retailers began to and did offer to the public substitute brands for said "Old Quaker" when said public called for said "Old Quaker" at the respective stores of said retailers; that said condi-

tion caused plaintiff great loss and threatened irreparable injury until said defendant a day or so later commenced to sell said brand of "Old Quaker" at 98c per pint, said price being then the price stipulated in said Fair Trade Agreements as aforesaid.

19. That on or about November 8, 1935, defendant, Carl L. McNeil, doing business as McNeil's Liquor Store, did [fol. 2-19] again offer to sell, advertise for sale and sell on the premises of said store in said city said brand of "Old Quaker" at 77c per pint; that said price was below the uniform and standard Schenley retail price for same as fixed in said Fair Trade Agreements between plaintiff and the other local Schenley distributors with the retailers of said city as aforesaid; that the defendant on or about said November 8, 1935, placed in the front display window of said store or place of business in said City of Chicago for the observation of the public and consumers, bottles of Schenley Products bearing the trade-name and trade-mark of "Old Quaker" and placed above said bottles attached to the pane of said window signs advertising "Old Quaker" at 77c per pint; that said price was approximately 20% below the uniform and standard Schenley retail price for said brand of "Old Quaker" fixed at said time and prior thereto, in the contracts of sale by plaintiff and local distributors with the majority of retailers selling brands of Schenley Products in said City of Chicago as aforesaid; that at said time and prior thereto said defendant well knew that plaintiff and other local Schenley distributors had sold to numerous retailers in said City of Chicago said brand of "Old Quaker" upon the agreement of said retailers, as above set forth, not to resell said brand of "Old Quaker" sold to them at less than 98c per pint and that said retailers were so selling said brand; that notwithstanding said knowledge of said defendant wilfully and knowingly so advertised and offered for sale said brand at less than the price stipulated in said contracts so entered into pursuant to the provisions of the Fair Trade Act.

[fol. 2-20] 20. That all of the quantity of said brand of "Old Quaker" which defendant threatened to sell, offered to sell, advertised for sale and sold at retail as aforesaid in said city below said uniform and standard Schenley retail price for said brand as fixed in said Fair Trade Agree-

ments as aforesaid, and is so threatening to sell, offering for sale, advertising for sale and selling at retail as aforesaid, was purchased by the defendant from various persons within the State of Illinois who kept and had said quantity in stock in said State prior to selling same to said defendant; that said quantity so purchased by defendant from said persons was purchased subsequent to the time when said Fair Trade Agreements were entered into by plaintiff and the other local Schenley distributors with substantially all of the retailers of said City of Chicago, and subsequent to the time said defendant knew of the standard and uniform Schenley retail price for said brand of "Old Quaker" fixed in said Agreement as aforesaid; that none of the quantity of said brand of "Old Quaker" which the defendant threatened to sell, offered to sell, advertised for sale or sold at retail as aforesaid below said price as aforesaid, or is threatening to sell, offering to sell, advertising for sale and selling below said price as aforesaid was so dealt with or is being so dealt with by defendant for the purpose of or in the course of closing out said quantity of said brand for the purpose of discontinuing delivery of said brand, nor because said quantity nor any part thereof was or is damaged or deteriorated nor on account of or pursuant to an order of court.

21. That unless said defendant is restrained forthwith by this court from advertising for sale, offering for sale, [fol. 2-21] and selling or continuing to advertise for sale, offer for sale and selling said brand of Schenley Products, namely, "Old Quaker," at less than the standard and uniform Schenley retail price fixed as aforesaid, namely, the price of $1.89 per quart, 98c per pint, and 50c per one-half pint of "Old Quaker," plaintiff will suffer great and irreparable injury, to wit: (a) said wilful acts of defendant will induce, coerce and force other retailers who have promised plaintiff as aforesaid, to breach said promises and sell below said standard and uniform Schenley retail price; (b) said wilful acts of the defendant will cause the public and consumers to believe that the various brands of Schenley Products are not worth the prices so fixed as aforesaid and other retailers will not be able to sell the various brands of Schenley Products including "Old Quaker" at such uniform and standard retail prices; (c)

that said wilful acts of the defendant will occasion great loss to the good-will established by plaintiff and local Schenley distributors and will destroy the value of the trade-marks and trade-names of the various brands of Schenley Products; (d) that said wilful acts of defendant will cause the public to confuse the various brands of Schenley Products; (e) that said wilful acts of defendant will demoralize the market for said Schenley Products in said City of Chicago and will cause general uneconomic lowering of prices and prevent persons selling said products from receiving a fair compensation for their services; (f) that said wilful acts of defendant imminently and immediately threaten devastation of plaintiff's business, destruction of plaintiff's good-will and multiple breaches and violation of agreements between plaintiff and other retailers as aforesaid.

[fol. 2-22] 25. That it will be extremely difficult to ascertain the amount of compensation which would afford relief to plaintiff for loss of sales, destruction of plaintiff's business and good will pertaining thereto occurring by virtue of the aforesaid acts of defendant; that pecuniary compensation will not afford plaintiff adequate relief; that restraint is necessary to prevent multiplicity of judicial proceedings.

Wherefore plaintiff prays:

(1) That upon presentation to the Court by plaintiff of such bond as the Court may require and approve, the Court grant a preliminary writ of injunction restraining the defendant, Carl L. McNeil, his employes, representatives, servants, salesmen, clerks, agents and attorneys, pending final hearing or sooner determination of this cause, from directly or indirectly advertising for sale at retail, offering for sale at retail, or selling at retail within the City of Chicago, a certain brand of whiskey distributed by Schenley Distributors, Inc., a New York corporation, said brand bearing the trade-mark and trade-name of "Old Quaker," at a price below $1.89 per quart, 98c per pint, and 50c per one-half pint;

(2) That upon final hearing the Court grant a permanent writ of injunction restraining the defendant, Carl L. McNeil, his employes, representatives, servants, salesmen,

clerks, agents and attorneys, from directly or indirectly advertising for sale at retail, offering for sale at retail, or selling at retail, within the City of Chicago, a certain brand of whiskey distributed by Schenley Distributors, Inc., a New York corporation, said brand bearing the trade-mark and trade-name of "Old Quaker," at a price below $1.89 per quart, 98c per pint, and 50c per one-half pint, until the [fol. 2-23] standard and uniform Schenley retail price for said brand within the City of Chicago, is changed.

(3) That the Court grant such other and further relief as to the Court may seem just and meet.

Joseph Triner Corporation, by Joseph Triner, Its Duly Authorized Agent in this Behalf.

Affidavit of Joseph Triner that he has read the complaint, knows the contents thereof and that the same is true.

EXHIBIT "A" TO COMPLAINT

Exhibit "A", being a facsimile of the label affixed to bottles containing the brand of whiskey known as "Old Quaker." The label consists of the figure of a Quaker standing before a sheaf of grain, a sack of malt and three barrels marked "Old Quaker Whiskey." A landscape scene forms the background. Above the picture is the following legend "Bottled at the Distillery. Old Quaker. Reg. U. S. Pat. Off. Brand." Below the picture is the following, "One Pint. Straight Bourbon Whiskey. Distilled and Bottled By The Old Quaker Company. Distillers. Lawrenceburg, Indiana. Division of Schenley Products Company.'" To the right of the picture is printed the following: "Old Quaker says: 'You don't have to be rich to enjoy rich whiskey!' Old Quaker Brand is a select straight whiskey distilled according to the finest old traditions . . . truly a mellow, full bodied whiskey of distinction." To the left of the picture is printed the following: "Old Quaker Brand. Straight Bourbon Whiskey. [fol. 2-24] This Whiskey is one year old. Distilled and bottled by the Old Quaker Company, Lawrenceburg, Ind."

Exhibit "B", in words and figures as follows:

EXHIBIT "B" TO COMPLAINT

Fair Trade Agreement

This Agreement made at Chicago, Illinois, this — day of ——, 19—, by and between Joseph Triner Corporation of Chicago, Illinois (hereinafter referred to as "Distributor") and —— —— (hereinafter referred to as "Retailer"), of Chicago, Illinois.

Witnesseth:

Whereas, Joseph Triner Corporation is engaged as a distributor within the city of Chicago, State of Illinois, in the sale at wholesale of certain liquors and alcoholic beverages of domestic manufacture of standard quality, bearing the trade mark, brand and name of the producer and/or owner of said liquors and alcoholic beverages, which are in fair and open compensation with liquors of the same general class produced by others; said liquors and alcoholic beverages being listed and more specifically described in a schedule marked "Schedule A" attached hereto and incorporated herein as part of this agreement (said liquors and alcoholic beverages being hereinafter referred to as "Schenley Products"); and,

Whereas, Retailer is engaged in said city in the sale at retail of Schenley Products to consumers and the general public at the current retail market price for said products and has an established and substantial business in connection therewith; and,

[fol. 2-25] Whereas, Distributor intends to sell to Retailer and Retailer intends to purchase from Distributor, Schenley Products upon the terms and conditions hereinafter set forth; and,

Whereas, Distributor and Retailer are desirous of availing themselves of, and securing to themselves and the public the benefits of, a certain Illinois Statute approved July 8, 1935, entitled, "An Act to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name", commonly known as the "Fair Trade Act"; and,

Whereas, in accordance with the provision of said Act and in the interest of protecting Distributor, Retailer and the public against injurious and uneconomic practices in the distribution of Schenley Products, Distributor proposes that any and all Schenley Products sold and purchased hereunder shall not be resold by Retailer except at the resale price, stipulated by Distributor as hereinafter provided, and Retailer proposes not to sell said products purchased hereunder except at said resale price as stipulated by Distributor; and,

Whereas, Distributor has entered, and is entering into, fair trade contracts with numerous other persons selling Schenley Products at said current retail market price which contracts contain provisions for resale price and resale price maintenance identical with those provided herein:

Now Therefore, in consideration of the promises hereinafter set forth Distributor and Retailer mutually agree as follows:

1. Retailer agrees not to resell, offer for resale or advertise for resale, either directly or indirectly, any brand of [fol. 2-26] Schenley Products, purchased hereunder by Retailer from Distributor, except at the resale price set opposite said brand listed in the schedule marked "Schedule A" attached hereto and incorporated herein as part of this agreement; provided, however, the undertaking of Retailer in this paragraph contained aforesaid shall not apply to Products sold by Distributor to Retailer in interstate commerce. Distributor shall notify Retailer of all Products sold by Distributor to Retailer in interstate commerce.

2. Distributor agrees to sell to Retailer and Retailer agrees to purchase from Distributor for the term of this contract any and all of Schenley Products which Retailer shall require for Retailer's business, provided, however, that so long as this contract remains in full force and effect Distributor agrees to sell to Retailer and Retailer agrees to purchase from Distributor during the first month after the date hereof and during each successive monthly period thereafter Schenley Products at a total price to Retailer hereunder of not less than $5.00 nor more than $1000.00.

3. Retailer agrees to pay to Distributor and Distributor agrees to accept from Retailer as the purchase price of all brands of Schenley Products sold by Distributor to Retailer hereunder, the price set opposite said brands listed in the schedule marked "Schedule A" attached hereto and incorporated herein as part of this agreement.

4. This agreement shall continue in full force and effect for a period of one (1) year from the date hereof provided, however, that this agreement may be terminated by either Distributor or Retailer upon the giving of at least ten (10) days written notice to the other. Notwithstanding [fol. 2-27] any termination of this agreement, whether under the provision hereof or otherwise, this agreement shall continue in force with respect to any Schenley Products purchased by Retailer from Distributor hereunder, prior to the occurrence of said termination, and in Retailer's possession or under his control at the time of said termination.

In Witness Whereof, the parties hereto have duly executed this agreement, all as of the day and year first above written.

Joseph Triner Corporation, by ——— ———, Pres. ——— ———, by ——— ———.

Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. Section 2 of the Illinois Fair Trade Act.

Exhibit "C", as follows:

EXHIBIT "C" TO COMPLAINT

Fair Trade Agreement

All Schenley Products sold and purchased hereunder are sold and purchased upon the express agreement of the buyer and the buyer hereby agrees not to retail same except at the seller's retail price list for same in force at the date

hereof, it being the intention of the parties to avail themselves of the Illinois Fair Trade Act.

[fol. 2-28] Summons and endorsement of Sheriff thereon.

Appearance of Carl W. McNeil, doing business as McNeil's Liquor Store, defendant, by J. Herzl Segal, his attorney.

Order entered November 16, 1935, in words and figures as follows:

ORDER DIRECTING ISSUANCE OF TEMPORARY INJUNCTION

This cause coming on to be heard upon the complaint filed herein and the affidavit filed therewith and in support thereof and in support of the prayer of said bill of complaint that a preliminary injunction issue, pending the determination of the cause on final hearing or sooner determination thereof, and the Court having read said complaint and accompanying affidavit and having heard the arguments of counsel and the defendant having had due notice that this matter was coming on to be heard at this time on the application for a preliminary injunction and said defendant appearing in Court by counsel in opposition to said application:

It Is Therefore Ordered by the Court, upon good cause shown, that an injunction bond to the defendant, Carl W. McNeil be waived and that the Clerk of this Court issue, under the hand and the seal of this Court a preliminary writ of injunction enjoining and restraining Carl W. McNeil, his employees, representatives, servants, salesmen, clerks, agents, and attorneys, pending final hearing or sooner determination of this cause, from directly or indirectly advertising for sale at retail, offering for sale at retail, or selling at retail within the City of Chicago, a certain brand of whiskey distributed by Schenley Distributors, Inc., a New York corporation, said brand bearing the trade mark and trade name of "Old Quaker," at a price below $1.89 per quart, 98c per pint, and 50c per one-half pint.

[fol. 2-29] And, It Is Further Ordered that said injunction remain in full force and effect until this Court shall make order to the contrary.

Enter.

Benjamin P. Epstein, Judge.

Written motion of defendant for a decree dismissing the complaint for want of equity on the ground that the complaint is substantially insufficient in law, filed November 18, 1935, in words and figures as follows:

MOTION TO DISMISS, ETC.

The defendant, Carl W. McNeil, moves that the temporary injunction heretofore issued in the above entitled cause be dissolved and that a decree be entered herein dismissing the complaint of Joseph Triner Corporation, plaintiff, for want of equity on the ground that complaint is substantially insufficient in law, and defendant specifies the following respects in which said complaint is insufficient:

I.

The alleged cause of action set forth in said complaint is predicated upon an unconstitutional and void statute passed by the General Assembly of the State of Illinois, to-wit: "An Act to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name." (Approved July 8, 1935, L. 1935, P. 1436), hereinafter referred to for convenience as the "Fair Trade Act."

A. Article I, Section 8 of the Constitution of the United States provides: "The Congress shall have power—* * * [fol. 2-30] to regulate commerce * * * among the several states * * *;" Said Fair Trade Act violates said Article I, Section 8, in that it attempts to regulate the sale of commodities in commerce among the several states.

B. Article I, Section 10 of the Constitution of the United States provides: "No state shall * * * pass any * * * law impairing the obligation of contracts; * * *." Said Fair Trade Act violates said Article I, Section 10, in that it impairs the obligation of the contracts of purchase and sale whereunder the plaintiff acquired the commodities alleged to have been offered for sale and sold by him, and impairs the obligations of like contracts of persons similarly situated.

C. Article XIV of Articles in addition to, and Amendment of, the Constitution of the United States, provides: "* * * nor shall any state deprive any person of * * * property, without due process of law." Said Fair Trade Act violates said Article XIV in that:

1. Its provisions, terms and language are so incomplete, vague, indefinite and uncertain that said act does not express clearly or intelligibly the subject matter attempted to be covered and the acts permitted, required or forbidden to be done thereunder;

2. It deprives the defendant and persons similarly situated of vested rights in articles and commodities owned by him;

3. It provides for an arbitrary, discriminatory, unreasonable and unjust classification of persons, one class being producers and owners of commodities bearing a trade mark, brand or name of the producer or owner, and the other class being producers and owners of commodities not bearing [fol. 2-31] such trade mark, brand or name.

4. It provides for an arbitrary, discriminatory, unreasonable and unjust classification of persons, one class being retailers of commodities bearing the trade mark, brand or name of the producer or previous owner and the other class being retailers of commodities not bearing such trade mark, brand or name.

D. Article XIV of Articles in addition to, and Amendment of, The Constitution of the United States, provides: "No state shall * * * deny to any person within its jurisdiction the equal protection of the laws." Said Fair Trade Act violates said Article in that:

1. It denies to defendant, and persons similarly situated, such right to dispose of his commodities as is enjoyed by persons dealing in commodities not bearing the trade mark, brand or name of the producer or owner;

2. It denies to producers and owners of commodities not bearing such trade mark, brand or name the right to fix the resale price thereof as is sought to be conferred upon producers and owners of commodities bearing such trade mark, brand or name.

E. Article II, Section 2, of the Constitution of Illinois of 1870, provides: "No person shall be deprived of * * * property, without due process of law." Said Fair Trade Act violates said Article II, Section 2, for the reasons set forth hereinabove in Point C, Paragraphs (1), (2), (3) and (4).

[fol. 2-32] F. Article II, Section 14, of the Constitution of Illinois of 1870, provides: "No * * * law impairing the obligation of contracts * * * shall be passed." Said Fair Trade Act violates said Article II, Section 14, for the reasons set forth hereinabove in Point B.

G. Article IV, Section 1, of the Constitution of Illinois of 1870, provides: "The legislative power shall be vested in a general assembly, which shall consist of a senate and house of representatives, both to be elected by the people." Said Fair Trade Act violates said Article IV, section 1, in that:

1. It delegates to persons, not constituting the general assembly, the legislative power to determine what constitutes "injurious and uneconomic practices," "articles of standard quality," and "commodities of the same general class";

2. It delegates to such persons the legislative power to determine the price at which commodities should be sold.

3. It delegates to such persons other powers legislative in character.

H. Article IV, Section 22, of the Constitution of the State of Illinois, provides: "The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: for * * * granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. In all other cases where a general law can be made applicable, no special [fol. 2-33] law shall be enacted." Said Fair Trade Act violates said Article IV, Section 22 in that:

1. It grants to vendors and purchasers of commodities bearing a trade mark, brand or name of the producer or owner the special and exclusive privilege of fixing the resale price thereof;

2. It grants to vendors and purchasers of commodities bearing such trade mark, brand or name, the special and exclusive privilege of controlling the price at which defendant and persons similarly situated may dispose of his commodities contrary to his volition.

3. It grants to vendors and purchasers of commodities bearing such trade mark, brand or name, the special and exclusive privilege of restricting the right of defendant and persons similarly situated to contract with reference to commodities owned by him.

4. It grants to retailers of commodities not bearing such trade mark, brand or name, the special and exclusive privilege (which is denied to defendant and persons similarly situated) of selling the commodities owned by them at a price or prices not controlled by persons with whom they have no privity of contract.

5. It grants to vendors and purchasers of commodities bearing such trade mark, brand or name, a special or exclusive immunity from the penalties and punishments imposed by a certain law passed by the General Assembly of the State of Illinois, to-wit: "An Act to provide for the punishment of persons, copartnerships, or corporations [fol. 2-34] forming pools, trusts and combines, and mode of procedure, and rules of evidence in such cases." (Approved June 11, 1891. L. 1891, p. 206.)

I. Said Fair Trade Act violates diverse other Articles and sections thereof of the Constitution of the United States and of the State of Illinois.

J. Herzl Segal, Attorney for Defendant, Carl W. McNeil, Doing Business as McNeil's Liquor Store.

Certificate

I, J. Herzl Segal, attorney for the defendant in the above entitled cause, do hereby certify that the above and foregoing motion for decree dismissing the complaint for want of equity is not interposed for the purpose of delay and in my opinion it is well founded in point of law.

J. Herzl Segal.

Decree entered December 24, 1935, in words and figures as follows:

DECREE

This cause coming on to be heard on motion of the defendant, Carl W. McNeil, for a decree dismissing the complaint for want of equity on the ground that the complaint is substantially insufficient in law, and the Court having heard the arguments of counsel for the defendant, and of counsel for the plaintiff, and being fully advised in the premises, it is hereby ordered that said motion of said defendant be and the same is hereby overruled. Whereupon the said defendant elects to abide by its said motion without further pleading on his part to the complaint in the above cause,

[fol. 2-35] It Is Therefore Ordered, Adjudged And Decreed that the said defendant, Carl W. McNeil, his employees, representatives, servants, clerks and attorneys, be and they and each of them are hereby permanently restrained and enjoined from directly or indirectly advertising for sale at retail, offering for sale at retail, or selling at retail, within the City of Chicago, State of Illinois, a certain brand of whiskey distributed by Schenley Distributors, Inc., a New York corporation, said brand bearing the trade mark and trade name of Old Quaker at a price below $1.89 per quart, 98c per pint and 50c per one-half pint, until the standard and uniform Schenley retail price for said brand within the city of Chicago, state of Illinois is changed; and it is hereby ordered that a permanent writ of injunction be issued out of this Court by the Clerk hereof restraining and enjoining the said defendant, Carl W. McNeil, his employees, representatives, servants, clerks and attorneys, and each of them, from directly or indirectly advertising for sale at retail, offering for sale at retail, or selling at retail, within the City of Chicago, state of Illinois, a certain brand of whiskey distributed by Schenley Distributors, Inc., a New York corporation, said brand bearing the trade mark and trade name of Old Quaker at a price below $1.89 per quart, 98c per pint and 50c per one-half pint, until the standard and uniform Schenley retail price for said brand within the city of Chicago is changed.

It Is Further Ordered, Adjudged And Decreed that the plaintiff have and recover of and from said defendant, Carl W. McNeil, its costs taxed in the above suit.

Enter. Benjamin P. Epstein, Judge.

[fol. 2-36] Notice of appeal, filed December 27, 1935.

Notice of filing of notice of appeal and proof of service thereof, filed December 28, 1935.

Præcipe for record and proof of service thereof, filed January 4, 1936.

REPORT OF PROCEEDINGS AT TRIAL—Filed January 9, 1936

OPINION

Statement of the Honorable Benjamin P. Epstein of the reasons for his decision, as follows:

The plaintiff, Joseph Triner Corporation, by its bill of complaint, alleges that it is a corporation engaged in business in the City of Chicago, County of Cook and State of Illinois, as a wholesale distributor, selling to retailers for resale in said city, various brands of liquors and alcoholic beverages of standard quality.

That the defendant, McNeil, is engaged in the business of selling at retail to the general public for consumption, various brands of liquor and alcoholic beverages; that the liquor sold by the plaintiff corporation is purchased from a corporation known as Schenley Distributors, Inc., a corporation organized and existing under and by virtue of the laws of the State of New York and duly licensed to do business in the State of Illinois; that Schenley Distributors, Inc., is the sole and common sales agent in the State of Illinois of several affiliated liquor distilleries and as said sales agent is engaged in the City of Chicago in the distribution of the products manufactured by said distilleries referred to and known as "Schenley Products"; that Schenley Distributors, Inc., sells and has sold Schenley Products to various wholesalers within said city for purposes of resale to retailers in said city; that the said wholesalers are known as [fol. 2-37] "local Schenley distributors" and are at the present and have been about ten in number; that the Schenley Products consist of various brands of straight whiskies, blended whiskies, bonded whiskies, gin, brandies and rum; that all of said brands at all times have been of standard quality or make; that all the said brands are sold in bottles

of standard size and content, each and all of which bottles has and have affixed therein a label bearing the trade mark "Registered with the United States Patent Office" and the brand and name of the producer; that said brands have been known in the liquor trade and to the general public by the trade name of "Old Quaker" and "Cream of Kentucky"; that each and all of said brands of Schenley Products sold at retail in the City of Chicago at all times have been in fair and open competition with commodities of the same general class produced by persons other than Schenley distilleries; that the Schenley Distributors, Inc., at all times has adhered to a trade policy of securing to the general public in the City of Chicago a uniform and standard retail price for each brand of Schenley product sold in said city; that said uniform standard retail prices at all times were fair and reasonable; that in accordance with its said business and trade policy of securing to the public or consumers a uniform and standard retail price for each of its brands, Schenley Distributors, Inc., has openly announced that it would not sell its products to any local Schenley Distributors who sold products to any retailer for less than the uniform and standard retail price suggested by Schenley Distributors, Inc.

The bill further alleges that there has been in force in the State of Illinois an Act duly passed by the General As- [fol. 2-38] sembly on July 8, 1935, known as the Fair Trade Act entitled "An Act to Protect Trade Mark Owners, Distributors, and the Public Against Injurious and Uneconomic Practices in the Distribution of Articles of Standard Quality Under a Trade Mark, Brand or Name," which Act in effect provides that no contract relating to the sale or resale of a commodity which bears, or the label or the content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of a provision, first, that the buyer will not resell such commodity except at the price stipulated by the vendor, and second, that the producer or vendee of a commodity require upon the sale of such commodity to another that such producer agree that he will not in turn resell except at the price stipulated by such producer or vendee; section 2 of the Act further

providing that wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, be considered unfair competition and actionable at the suit of any person damaged thereby.

The bill further alleges that after the enactment of said Act the complainant, to protect itself and the public and to avail itself of the benefits of said Act, in all of its sales of Schenley Products to retailers in said city, by agreement with said retailers, fixed the resale price of its brands at [fol. 2-39] the uniform and standard Schenley retail price; that all of this was known to the defendant; that all Schenley distributors in the City of Chicago made substantially all of their sales of Schenley products to retail sellers upon the same conditions as to the fixing of a resale price; that the defendant advertised and sold Schenley Products bearing the trade name and trade mark of the producer of said brands at a price below the uniform and standard Schenley retail price for said brands, and that the defendant knowingly and wilfully advertised and offered for sale and sold said brands at less than the standard and fixed price. The bill prays for a permanent injunction restraining the defendant from acts of price cutting.

On November 16, 1935, on the application of the complainant, a temporary injunction was issued by this court, restraining the defendant, Carl W. McNeil, doing business as McNeil's Liquor Store, from directly or indirectly advertising for sale at retail or selling at retail within the City of Chicago the brands of whiskey distributed by Schenley Distributors, Inc. under the trade mark and trade name of "Old Quaker" at a price below $1.89 per quart, 98c per pint and 50c per half-pint.

The defendant has moved to dismiss the complaint and to dissolve the injunction on the ground that the Act of the General Assembly of the State of Illinois known as the Fair Trade Act was unconstitutional and void.

Upon the argument of the said motion to dismiss the bill of complaint, which motion in effect admitted the truth of the allegations of the bill of complaint well pleaded, it was contended that the Fair Trade Act was in violation of the 5th and 14th amendments to the Constitution of the United

[fol. 2-40] States in that it deprived persons of their property without due process of law and without compensation; that it abridged privileges and immunities of citizens; that it deprived them of the full and free use of their individual property; that it imposed an unlawful, unnecessary and unreasonable restraint upon the alienation of property; that it was not a valid exercise of the police power of the State; that it was not for the protection of the peace, health, safety, morals or welfare of the public and that it was for the benefit of an arbitrary and unjust classification of persons named in the Act; that its provisions were vague, uncertain and indefinite, and that it impaired the obligation of contracts.

In discussing the question of the constitutionality of the Act in question, it may be well to state at the outset that seven or eight of the States of the Union have passed a similar statute within the past two years. My attention has been called to a similar statute in the State of California, Wisconsin, New York and others. The validity of this particular kind of legislation has as yet not been passed upon by the courts of last resort of the particular States which have legislated upon the subject. A number of lower courts in the various States have, however, passed upon the constitutionality of statutes similar to the one in question. A few have held this character of legislation to be in violation of the Constitution of the United States and an unwarranted and unconstitutional exercise of the police power of the State.

The greater number of the decisions, however, have sustained the legislation and have declared it to be legislation passed under the valid exercise of the police power of the State.

[fol. 2-41] The diversity in opinion of the various chancellors who have passed upon the question throughout the United States justifies the statement recently made by Prof. Thomas Read Powell in his article of November, 1935, entitled "Commerce, Pensions and Codes" in the Harvard Law Review:

"The problem of the extent to which government should regulate will always pose innumerable questions upon which men will differ in their views. After government has regulated, those who dislike the statute may still differ about it. Some will call it unconstitutional and some will

be content to stop with saying that it is unpleasant and unwise."

In a long line of cases decided by the Supreme Court of the United States, we find authority for the statement that the Constitution of the United States does not guarantee the unrestricted privilege to engage in business or to conduct it as one pleases, and that the 5th Amendment to the Constitution of the United States in the field of Federal activity and the 14th Amendment as respects State action do not prohibit government regulation for the public welfare. The case of Tyson v. Banton (273 U. S. 418) holding a law of the State of New York, prohibiting "ticket scalping," invalid, is not in conflict with this doctrine. For while the Court in that case did say:

"The right of the owner of property to fix a price at which his property shall be sold or used is an inherent attribute of the property itself and as such within the protection of the due process of law clauses of the 5th and 14th Amendments to the Constitution of the United States (City of Carrollton v. Bizett, 159 Ill. 284, at p. 294)."

It, nevertheless, also said:

[fol. 2-42] "The power to regulate property, service or business may be invoked, but only under special circumstances."

In one of the recent decisions (Nebbia v. New York, 291 U. S. 529) of the Supreme Court of the United States on the effect to be given to the 5th and 14th Amendments to the Constitution, we find the following principles of law announced:

"They (5th and 14th Amendments) merely condition the exertion of the admitted power by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as had often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and a substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort or for the same business under other circumstances, because the reasonableness of each regula-

tion depends upon the relevant facts. The reports of the Supreme Court of the United States abound with cases in which the citizen, individual or corporate, has vainly invoked the 14th Amendment in resistance to necessary and appropriate exertion of the police power of the State. Legislation concerning sales of goods and incidentally affecting prices, has been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another (Central Lumber Co. v. South Dakota, 226 U. S. 157) by giving trade inducements to purchasers, (Rast v. Van Deman & Lewis Co., 240 U. S. 342) and by other forms of price discrimination. (Van Camp and Sons Co. v. American Can Co., 278 U. S. 245)."

[fol. 2-43] The statute involved in the case of Nebbia v. New York, supra, was a Statute of the State of New York in effect fixing the selling price of milk to retailers and to the consuming public. This Statute was held to be valid. Likewise consistent with the principles announced by the Supreme Court in the above cases are the principles of law laid down by the Supreme Court of the State of Illinois in the case of Stewart v. Brady, 300 Ill. 425, in which case the Blue Sky Law of the State of Illinois was held to be a valid exercise of the police power of the State. In that case the Supreme Court of our State said:

"It is a question for legislative determination whether an evil exists and what means should be adopted to prevent it, and its acts will not be interfered with unless they are clearly in violation of some constitutional limitation. * * * Its classification of the objects of legislation is not required to be scientific, logical or consistent if it is reasonably adapted to secure the purpose for which it is intended and is not purely arbitrary. * * * It cannot be disturbed by the courts unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. It is competent for a legislature to determine upon what differences a distinction may be made for the purpose of statutory classification between objects otherwise having resemblance, though such power cannot be arbitrarily exercised, and the distinction must have a reasonable basis (International Harvester Co. v. Missouri, 234 U. S. 199).

In that case attention is called to the distinction between legislative power and the wisdom of its exercise in these words: 'It is to be remembered that the question presented is of the power of the legislature—not the policy of the exercise of the power. To be able to find fault, therefore, [fol. 2-44] with such policy is not to establish the invalidity of the law based upon it.'

Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether in short the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature and the earnest conflict of serious opinion does not suffice to bring them within the reign of judicial cognizance * * * One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

In the case of German Reliance Insurance Company v. Kansas, 233 U. S. 389, the Supreme Court of the United States said:

"Against that conservatism of the mind which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it becomes familiar, government, state and national—has pressed on in the interest of the general welfare; and our reports are full of cases where in instance after instance the exercise of the regulation was resisted, and yet sustained against attacks asserted to be justified by the Constitution of the United States. The fear and the dread of the moment having passed, no one is now heard to say that rights were restrained or constitutional guarantees impaired."

Again, in sustaining the constitutionality of a zoning ordinance, attacked as a violation of the 14th amendment, the Supreme Court said:

"Regulations, the wisdom, the necessity and validity of which, as applied to existing conditions, are so apparent [fol. 2-45] that they are now uniformly sustained, a century ago, probably would have been rejected as arbitrary

and oppressive." (Village of Euclid v. Ambler Realty Co., 272 U. S. 365.)

What did the legislature of the State of Illinois have in mind when they passed the Fair Trade Act, giving a remedy to that great and large class of persons and corporations who engage in trade and industry selling commodities under a trade mark, trade name and brand, and imposing restrictions in certain events upon the alienation of property in the hands of an individual? Was it as was said in the case of Steward v. Brady, supra, a question for legislative determination as to whether an evil existed and what means should be adopted to prevent it? Did an evid exist? And was the creation of a right and the imposition of a burden a valid exercise of the police power of the state and for the general welfare of the people of the State of Illinois? The legislature undoubtedly had in mind the evil of price cutting and the demoralization and the destruction of legitimate business as a result thereof. Perhaps it believed in the economic truth of the views of Mr. Gilbert H. Montague set forth in his book, Business Competition and the Law, published by Putnam and Sons, New York:

"Every purchaser knows that no matter from whom he buys popular branded goods, he will receive the same quality for the standard price. Competition, therefore, becomes transformed and vastly increased, and expands into national dimensions. Every popular brand of goods competes with all unbranded goods of the same general class and with all other brands of goods of the same general class. Prices on any popular brand of goods are prevented [fol. 2-46] by this competition from being too high. For any excess in price of one brand over that of unbranded goods or other brands of goods of the same general class cannot exceed the sum that the consumer will be willing to pay for the insurance of quality and reliability. * * * Since the manufacturer of popular branded goods assumes the chief part of the salesmanship in each successive sale and resale of goods, and the consuming public does not have its standard price increased—for competition as we have seen prevents this—it would seem to be in the public interest to permit the manufacturer to use this reasonable means to expand his business for the sake of more effective competition with his rivals * * * Price cutting more

often is only a sudden raid, timed by the price cutter so as to produce the greatest demoralization and stampede of his competitor's trade, not only in the lines on which he is cutting prices, but also in other lines, and executed at a large initial loss to the price cutter in the confidence that under cover of the resulting demoralization and stampede he can more than recoup upon other lines. So immediate and deadly is this kind of price cutting that if a price cutter misses killing his dealer competitor, he not infrequently kills, and always seriously hurts the manufacturer of the popular branded goods."

Perhaps the legislature had in mind the words and subscribed to the views of Justice Oliver Wendell Holmes of the United States Supreme Court, expressed in his dissenting opinion in the case of Dr. Miles Medical Co. v. Park & Sons, 220 U. S. 412:

"I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."

[fol. 2-47] Perhaps the legislature believed in the economic truth of the views expressed by the Supreme Court of the United States in the Appalachian Coal Co., Inc. v. U. S., 288 U. S. 344, p. 374:

"The intelligent conduct of commerce through the acquisition of full information of all relevant facts may properly be sought by the cooperation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result. Putting an end to injurious practices, and the consequent improvement of the competitive position of a group of producers, is not a less worthy aim and may be entirely consonant with the public interest, where the group must still meet effective competition in a fair market and neither seeks nor is able to effect a domination of prices."

It is to be noted that the statute, the "Fair Trade Act," applies only to the sale or resale of a commodity which is in effect in open competition with commodities of the same

tive label upon which appear the figure of a Quaker standing before a sheaf of grain, a sack of malt and three barrels marked "Old Quaker Whiskey." Above the picture is the legend, "Bottled at the Distillery. Old Quaker. Reg. U. S. Pat. Off. Brand." The name "Old Quaker" appears in bold lettering. Below the picture there is this statement: "One pint. Straight bourbon whiskey. Distilled and bottled by the Old Quaker Company. Distillers. Lawrenceburg, Indiana. Division of Schenley Products Company.". The whiskey has been sold and retailed under the trade-mark which definitely designates the brand and has become well known to the trade. This brand is retailed at $1.89 per quart, 98 cents per pint and 50 cents per one-half pint. These prices, under existing conditions, appear to be fair prices when considered with like commodities.

The method of merchandising "Old Quaker", as set forth in the complaint, is as follows: Schenley Distributors, Inc., the sales agent, sells to ten wholesale distributors in Chicago, one of whom is the plaintiff, suggesting to these local distributors a minimum retail price which it fixes as the uniform retail price for "Old Quaker" and each of the other brands of Schenley products to be sold in Chicago. This price is the uniform and standard Schenley retail price. If a distributor sells to a retailer who is known to sell below the Schenley list price, Schenley Distributors, Inc., refuses further to sell Schenley products to such distributor. The distributors, in turn, refuse to sell "Old Quaker", or any other Schenley product, to any retailer in Chicago except on the condition that such retailer will not sell below the uniform Schenley retail price. To that end, the plaintiff and the other local distributors make all sales of "Old Quaker" or other Schenley products under agreements of sale denominated "Fair Trade Agreements", which expressly provide that the retailer will not resell in the city except at the uniform and standard Schenley retail price. From the allegations of the complaint it further appears that as a direct result of the trade policy and practice described, approximately eighty-five per cent of the retailers of Schenley products in Chicago consistently maintain the Schenley retail price list for "Old Quaker" and other Schenley brands.

The Joseph Triner Corporation, the plaintiff, is a domestic corporation engaged in business in Chicago as a wholesale distributor, selling to retailers for re-sale in that city various brands of liquor and alcoholic beverages of standard quality. On November 8, 1935, it brought an action in the circuit court of Cook county to restrain Carl W. McNeil, the defendant, a liquor retail dealer, from selling Old Quaker whiskey in the Chicago district at prices less than those provided in the fair-trade agreements previously mentioned. From the allegations of the complaint, which the defendant by his motion to dismiss admitted to be true, it appears that the plaintiff was also operating pursuant to the trade policy and practice by which the Schenley Distributors, Inc., sought to maintain the prices specified in the fair trade agreements."

The complaint charges that a few vendors of liquor at retail in Chicago pursue a practice of "cutting" the prevailing retail price of brands of liquor which have acquired widespread attention and public favor. These retailers, it is charged, sell the popular brands at prices conspicuously lower than the prevailing price, and at a loss or scant return to themselves for the purpose of attracting the public to their stores and selling other brands of liquor or general merchandise at prices sufficiently high to meet the loss and assure a general profit. The use of "leaders" in this familiar form of price-cutting is asserted to cause irreparable loss not only to the producer of brands sold at the cut-price and to the distributors of such brands, but also to the ultimate consumers or general public.

The plaintiff, at the time of filing its complaint, had established a substantial and profitable business in selling at wholesale "Old Quaker" and other Schenley products in Chicago. A valuable asset of its business is the good will of the retailers who purchase from it for resale in the city the various brands of Schenley products, including "Old Quaker". Similarly, the good will of the public and consumers who purchase such products is deemed an important asset. According to the complaint, a uniform price assures the retailers comparative immunity from injurious price-cutting by other retailers and a reasonable profit upon their retail sales.

In October, 1935, the defendant, with full knowledge of the fair trade agreements entered into by the plaintiff and the other local Schenley distributors with substantially all the retailers of liquor in Chicago, threatened to sell, offer for sale and advertise for sale at retail, a quantity of "Old Quaker" at a price appreciably below the uniform Schenley retail price for the brand stipulated in the contracts. On October 16, the plaintiff informed the defendant of its trade policy in maintaining a uniform price for "Old Quaker" and other Schenley brands throughout the city. In particular, the defendant was advised of the provisions of the fair trade agreements executed conformably to the Fair Trade act. He was also informed of the irreparable injury which would result to the plaintiff if he persisted in executing his threat to "cut" the price of "Old Quaker". The plaintiff specifically requested the defendant to refrain from his contemplated course and indicated its willingness to sell to him any Schenley products he might wish, provided he would agree not to sell them at retail below the standard list price. Subsequently, on several occasions, the defendant offered for sale and sold large quantities of "Old Quaker" at 77 cents per pint, or more than twenty per cent below the Schenley uniform retail price. Defendant was again urged to desist but refused. On November 8, 1935, he advertised "Old Quaker" for sale at 77 cents per pint.

None of the quantity advertised or sold by the defendant at the cut-price was offered for sale or sold in the course of closing out any of such quantity for the purpose of discontinuing deliveries, nor because any of the liquor was damaged or deteriorated, nor owing to a court order. In short, the defendant does not come within the exceptions enumerated in section 1 of the Fair Trade act. During this time "Old Quaker" was in fair and open competition with about ten other brands of the same general class of commodity produced by persons other than the manufacturers of Schenley products.

The plaintiff charged that as a consequence of the defendant's conduct, a great number of retailers in the area where the defendant's store was located threatened to violate their contracts with it and the other local Schenley distributors by meeting the competitive price fixed by the

defendant, and that several of the retailers did, in fact, breach their agreements. The result of meeting the cut-price established by the defendant was that the sales at the reduced prices did not yield the retailers a fair and reasonable profit, and that when the public requested "Old Quaker" some of the merchants offered their customers substitute brands.

The concluding allegations of the complaint are that if the defendant continues his practice, the plaintiff will suffer irreparable injury to its business in the following respects: (1) Retailers who have signed Fair Trade agreements will be compelled to violate their agreements and sell below the Schenley standard price; (2) the cut-price will cause the public and consumers to believe that "Old Quaker" is not worth the uniform retail price and, in consequence, the retailers will be unable to sell at the standard price; (3) great loss to the good will established by the local distributors will ensue and the value of the trade-marks and trade-names of the Schenley products destroyed; (4) the public will become confused as to the various brands of such products, and (5) the market for them in Chicago will become demoralized and produce a general uneconomic lowering of prices. The acts of the defendant previously set forth constituted, according to the plaintiff, an imminent threat to the destruction of its business. Money damages, it was claimed, would not compensate the plaintiff, and restraint of the defendant was alleged to be necessary to prevent multiplicity of legal proceedings.

The defendant, by a motion to dismiss the complaint, challenged the constitutionality of the Fair Trade act. The court held the statute valid and over-ruled the motion to dismiss. The defendant elected to abide by his pleading, and a decree was entered permanently enjoining him from vending at retail "Old Quaker" whiskey at a price below $1.98 per quart, 98 cents per pint, and 50 cents per one-half pint, until the standard and uniform Schenley retail price for the brand named should be changed in Chicago. To obtain a reversal of that decree the defendant prosecutes this appeal.

The defendant contends that the decree is erroneous for the reason that the Fair Trade act violates the Federal and

State constitutions in the particulars set forth in his motion to dismiss the plaintiff's complaint. The propriety of the remedy employed is not assailed. The single question thus presented for decision is whether the statute squares with the Federal and State constitutions or offends them in the respects assigned and argued by the defendant.

The contention is made that the Fair Trade Act violates the equal protection of the laws provision of the fourteenth amendment to the Federal constitution, the due process clauses of the Federal and State constitutions, and also section 22 of article 4 of the State constitution. To sustain the decree the plaintiff maintains that the Fair Trade act constitutes a valid exercise of the police power and that the statute is not open to the constitutional objections interposed.

The police power may be exercised not only in the interest of the public health, morals, comfort and safety, but also for the promotion of the general welfare. *Fenske Bros* v. *Upholsterers Union*, 358 Ill. 239; *City of Aurora* v. *Burns*, 319 id. 84. The case last cited contains a notable exposition of the doctrine that the police power of the State is not a static or dormant concept but is sufficiently dynamic to meet the varying needs of modern society. This court, in sustaining the validity of a zoning ordinance, observed: "With the growth and development of the State the police power necessarily develops, within reasonable bounds, to meet the changing conditions. (*Public Utilities Co.* v. *City of Quincy*, 290 Ill. 360. The power is not circumscribed by precedents arising out of past conditions, but is elastic and capable of expansion in order to keep pace with human progress. Mr. Justice Holmes well defined the nature and extent of the power in *Noble State Bank* v. *Haskell*, 219 U. S. 104; 'It may be said in a general way that the police power extends to all the great public needs. (*Camfield* v. *United States*, 167 U. S. 518.) It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' "

Legislatures have long endeavored to promote free competition by laws aimed at trusts and monopolies such as

the Anti-Trust act of this State enacted in 1891. (Ill. State Bar Stat. 1935, p. 1235; Smith's Stats. 1935, p. 1201.) It is manifest that when the General Assembly enacted the Fair Trade act in 1935 it was attempting to modify its former policy and to adopt an economic concept which has received widespread popular approval in recent years. The gist of the theory is that the manufacturer of a trade-marked article, sold in competition with articles of similar nature, who has designated a fair price at which he, as well as his distributor and retailer, can make a fair profit, has a property right in the good will towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to employ it in a misleading manner for the purpose of deceiving the public. "The basic theory on which this concept rests," observed the California Supreme Court in *Max Factor & Co. v. Kunsman,* 55 Pac. (2d) 177, "is that, from a social standpoint, price cutting, in the long run, adversely affects the public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products." Section 2 of the California Fair Trade act, as does section 3 of our law, prohibits manufacturers from contracting between themselves to fix resale prices.

To the extent that the Fair Trade act effects a change in the economic public policy of this State we have no power to interfere. It is wholly immaterial whether the individual members of this Court agree with the economic and social philosophy upon which the Fair Trade act is established, and no duty rests upon us to pass upon the wisdom of the economic public policy which it declares. That function is wholly legislative. It is not a judicial function to lecture either the public or business. Neither is it within the province of a court to philosophize concerning economic conditions. In passing, however, we can not help but note that many of the present legislative enactments such as the Fair Trade acts of New York, California and Illinois are resultants brought about because of the failure of the public and, particularly, the business public to observe those

ethical principles which lie at the very foundation of fair dealing and business honesty. The shady efforts made by some to obtain an unfair advantage over others are not compatible with good citizenship, nor in keeping with the best traditions of the law merchant as known at the common law. If public opinion can not check these practices then business can expect legislatures to attempt to remedy them.

The Fair Trade act is intended to curb one of these practices by protecting the manufacturer who has built up a brand or article based on quality and excellence, and preventing its use as a "loss leader" by those who would sell it for the purpose only of inveigling the public into patronizing their places of business in the hope of obtaining a profit on other goods of inferior quality In other words, the reputation of the one is used for the personal advantage of the other. The legislative determination of whether this statute is a proper exercise of the police power, however, is not necessarily conclusive. Whether the means employed have any real substantial relation to the public health, comfort, safety or welfare, or are essentially arbitrary and unreasonable, is a question which is subject to review by the courts. *People* v. *Belcastro,* 356 Ill. 144; *People* v. *Rosehill Cemetery Co.,* 334 id. 556; *Condon* v. *Village of Forest Park,* 278 id. 218; *People* v. *Steele,* 231 id. 340.

The defendant maintains that section 2 of the Fair Trade act arbitrarily deprives him of his right to determine the price at which he will sell his commodities and, in consequence, violates the due process clauses of the Federal and State constitutions. The right asserted is not unfettered and is, of course, subject to the legitimate exercise of the police power. Although we find that only two courts of last resort have passed upon the validity of Fair Trade acts such as the one in controversy, an analogous statute was held constitutional nearly twenty years ago. *Robt. H. Ingersoll & Bro.* v. *Hahne & Co.,* 88 N. J. Eq. 222, 101 Atl. 1030. A statute of the State of New Jersey enacted in 1916 declared it unlawful for any merchant, firm, or corporation to appropriate for his or their own use a name, brand, trade-mark, reputation, or good will of any maker in

whose product they dealt, or to discriminate against it by depreciating the value of the products in the public mind by misrepresentation as to value or quality or by price inducement, except where the goods did not carry a notice prohibiting such practice. The factual situation disclosed that the complainant, a manufacturer of watches, sold under the Ingersoll name, among others, a watch known as the "Yankee Watch." This product was advertised throughout the United States to be sold to the consumer at $1.35. The complainant charged that the only method by which the watches could be sold for this low price was to manufacture them in immense quantities, and that the only way to obtain customers upon a large scale was by extensive advertising; that the name "Ingersoll" and the reputation of the firm for fair dealing and reliable products was nation wide; that it was absolutely necessary as a part of the advertising and building up of the business that a definite fixed price should form a part of the advertising for each of the products, and that all the Ingersoll watches were sold subject to a notice forbidding the retailer to dispose of them for less than a price fixed by the manufacturer. A jobber in New York disposed of the watches to a New Jersey retailer, who sold them for less than the standard price. Upon the facts presented the statute was held valid. The vice-chancellor, in his opinion, said: "Complainant has no monopoly. Its goods are not manufactured under patents. It is constantly in competition with manufacturers of cheap watches. Not only is it morally bound as a result of its advertising to guarantee its product, but it, in fact, guarantees it in writing. The defendant makes use of the name, reputation, and guaranty of complainant for its own ulterior purpose and appropriates to itself the effect of the extensive advertising, upon which the complainant depends, for defendant's own profit, in violation of the contract expressed in the notice, and with no desire to benefit the public. A retailer does not sell a standard article at a loss for eleemosynary purposes."

The injunction granted the complainant was subsequently made permanent in *Robt. H. Ingersoll & Bro.* v. *Hahne & Co.*, 89 N. J. Eq. 332, 108 Atl. 128. The same jurist in this later case pointed out that even in the absence

of statute, contracts relating to trade and containing restraints are valid if such restraints are reasonable. In particular, the court said: "It is also well recognized that a person has a property interest in his trade-name and good will, and will, even in the absence of statute, be protected against injury to that trade-name and good will. This right has in this State been as above indicated recognized by statute. • • • In those cases in which the right to fix a resale price has been under consideration, the prohibition against the resale has been against the resale of the article itself. The name or trade-mark or what not has been so much an integral part of the article as that a resale of the article without reference to the trade-mark or trade-name would be practically impossible. In the case at bar the prohibition is not against a resale of the article, nor is it impracticable to resell the article without reference to the trade-name. • • • Complainant does not seek to retain any right in the article itself; it merely seeks to restrain the use of its trade-name and good will, except under conditions fixed by it. It may permit the purchaser of the article to use its trade-name and good will under such conditions as it sees fit. • • • It seems to me that there is a clear distinction between those cases in which the nature of the restraint is such as necessarily to affect the resale of the article itself and the case at bar where the nature of the restraint is not such."

The contention was made in the celebrated case of *Nebbia* v. *New York*, 291 U. S. 502, that because the Milk-Control law of New York essayed to control prices it denied due process. The Supreme Court of the United States in answering this contention, said: "The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the State is incapable of directly controlling the price itself.

This view was negatived many years ago. *Munn* v. *Illinois*, 94 U. S. 113."

The court reviewed numerous decisions (*German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389; *Griffith* v. *Connecticut*, 218 id. 563; *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 id. 251; *Frisbie* v. *United States*, 157 id. 160; *Yeiser* v. *Dysart*, 267 id. 540; *Cotting* v. *Kansas City Stockyards Co.*, 183 id. 792 and *Stephenson* v. *Binford*, 287 id. 251;) showing that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices. The court then observed: "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, 535. The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest,' and 'clothed with a public use,' have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the State may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

The defendant, however, invokes *Doubleday, Doran & Co.* v. *R. H. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409, in which section 2 of the New York Fair Trade Act identical with the same section of our statute assailed in the present case, was held unconstitutional as applied to the facts set forth

in the complaint. The articles in question were books. The Doubleday books are not commodities within the accepted meaning of the term. Each book rests upon its own merit and outside of the binding and paper content it bears no similarity to the intent of the term used in the act, namely, commodities. A general statute such as the Fair Trade Act may, of course, be invalid when applied to one set of facts and clearly valid when applied to other fact situations. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282. The court, in *Max Factor & Co.* v. *Kunsman*, *supra*, distinguished the *Doubleday, Doran & Co.* decision and held it inapplicable to the facts presented in the California case. The court said: "The plaintiffs in the New York case were Doubleday, Doran & Co., Inc., publishers, and Doubleday, Doran Book Shops, Inc., retailers. The contract mentioned in the decision is one between the publishing corporation and the retailing corporation. Aside from any inference to be drawn from the similarity of names, the opinion states that the two plaintiffs, in reality, were one and the same, for it refers to 'the price which they (the plaintiffs) stipulated as a retail price in a *contract between themselves.*'

"Other language indicates the book shop corporation is merely a subsidiary and agent of the publishing company. Again, the plaintiff publishers sold the books in question to the defendant without exacting or, in so far as appears, atempting to exact, from the buyer and restriction on the price for resale. In other words, the producer of goods placed a retail price upon its product by its own independent action, and voluntarily sold the goods to a retailer (Macy & Co.) for resale without seeking, or at least obtaining, any agreement by the retailer to observe any retail price. In the action, it seeks to prevent the retailer, to whom it has sold the goods without restrictions, from selling the goods at prices less than those which the producer saw fit to fix, in a contract between it and a subsidiary. The New York court accepts, for the purpose of the decision, the interpretation of the act as covering such situation, and, upon that assumption, and apparently that assumption alone, holds section 2 of the act to be unconstitutional. The plaintiffs in the New York case allege

only a single contract purporting to fix the resale prices, and that in a pretended contract made with itself, far different from the factual set-up in the *Max Factor & Co.* case. Here there has been adopted a system of making written contracts, generally between producers and retail distributors, under which the products may and will be sold only to retailers who will resell at specified prices and have entered into contracts with the distributor to so sell such products. Practically all of the wholesale and retail druggists in California have executed such contracts, and are observing them, and the plaintiffs' distributors have refused, and will refuse, to sell such products to wholesalers or retailers who do not enter into such contracts. A contract has been tendered to defendant for execution, but defendant will not enter into the agreement. The plaintiffs therefore decline to sell the commodities to defendant unless the defendant enters into the contract. The defendant, with full knowledge of the system of contracts, and the extent of the execution and compliance with their terms by the trade, has obtained Factor products 'unbeknown' to plaintiffs, and is selling them at prices less than the prices fixed by the contracts so extensively entered into by others. These facts serve to vitally differentiate the situation in New York from that here."

The defendant argues, however, that the Fair Trade Act creates an arbitrary classification of persons, and grants to such persons special privileges and immunities in contravention of the constitutional guaranties invoked. He asserts that the vendors and vendees of commodities bearing the trade-mark, brand or name of the producer or owner may under certain circumstances fix the resale price thereof immune from the criminal penalties prescribed by the Anti-Trust act. The argument rests upon the assumption that there is no rational basis for denying to the vendors and vendees of commodities not bearing such trade-mark symbols the right to fix the resale price without incurring the penalties of the Anti-Trust act.

The first section of the fourteenth amendment to the Federal constitution declares that "No State shall make or enforce any law which shall abridge the privileges or im-

munities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The fourteenth amendment does not purport to prevent a State, however, from adjusting its legislation to differences in situation and to that end to make a justifiable classification. It merely requires that the classification shall be based on a real and substantial difference having a rational relation to the subject of the particular legislation. *Nebbia* v. *New York* supra; *Power Manufacturing Co.* v. *Saunders*, 274 U. S. 490; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 id. 61; *Magoun* v. *Illinois Trust and Savings Bank*, 170 id. 283; *Mich. Millers Ins. Co.*, v. *McDonough*, 358 Ill. 575; *Stewart* v. *Brady*, 300 id. 425.

Supplementing the equal protection provision of the fourteenth amendment, section 22 of article 4 of the constitution of this State prohibits the passage of a special law granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. The purpose of this provision is to prevent the enlargement of the rights of one or more persons and the impairment of or discrimination against the rights of others. To avoid falling within the constitutional inhibition of special legislation the classification of subjects or objects must be based upon some reasonable and substantial difference in kind, situation or circumstance bearing a proper relation to the purposes to be attained by the statute. *Mich. Millers Ins. Co.* v. *McDonough, supra; Jones* v. *Chicago, Rock Island and Pacific Railway Co.*, 231 Ill. 302.

The California Supreme Court, in passing upon the validity of the Fair Trade act of California, section 1½ of which corresponds to the Fair Trade act of our State, *Max Factor & Co.* v. *Kunsman, supra*, said: "Respondent also urges that the statute denies equal protection of the laws in that it applies only to articles sold under a trade-mark or trade or brand-name, and does not apply to nontrade-marked commodities, and, among trade-marked articles, applies only to those in free and open competition with others of a similar nature. As already pointed out, it is only in ref-

erence to those commodities included within the statute that the manufacturer or producer has a property right in the nature of good will, which, in the public interest, should be protected. Such a classification is reasonable. The exclusion of trade-marked articles not in free and open competition with others of a similar nature is likewise reasonable. By that provision the public is protected from artificially high prices imposed by one with an exclusive market."

The anti-Trust act expresses the public policy of the State against trusts and combinations, organized for the purpose of suppressing competition and creating monopoly. *Harding* v. *American Glucose Co.*, 182 Ill. 551. The Fair Trade act does not assume to permit restrictions on the price at which trade-marked commodities may be resold, irrespective of whether resold under the trade-mark. It permits restrictions to be placed on the *use* of trade-marks, names and brands, not restrictions on the price of commodities generally, except as the plaintiff contends, to the extent that new commodities may become involved in an attempt to damage the good will built around a trade-mark, name or brand. The manifest legislative intent is the protection of the property interest in a mark, name or brand by preventing the use of the symbol by price-cutting retailers in ways likely to depreciate the property interest. Such competitors could also destroy a commodity built on merit by underselling and thus destroying the purpose of the label intended to signify quality. As applied to the present case, by using the trade-name of a well known liquor the defendant, in effect, attracts the public to his store and thereby induces the visitors to become purchasers of other goods offered for sale. The defendant thus benefits at the expense of the trade-name, "Old Quaker", by using the plaintiff's products as a means to draw trade. Price-cutting primarily injures the owner of a good will which has become identified with a trade-mark, brand or name, on a commodity competing in the market with other goods of the same general class. On the other hand, the manufacturers and distributors of commodities which bear no trade symbol obviously cannot have a good will which requires the protection afforded by the Fair Trade act.

The only resale price maintenance, if any, permitted by the Fair Trade act is vertical. Vertical price maintenance merely enables a producer, or his distributor, to set a price at which the trade-marked commodity shall be sold to the consumer. Section 1 specifically provides that a commodity in order to be subject to the contracts permitted under the Fair Trade act must be "in fair and open competition with commodities of the same general class produced by others." Section 3 declares that the act shall not apply to any contract or agreement between producers or between wholesalers or between retails as to sale or resale prices. In short, it does not apply to horizontal price maintenance. The statute clearly does not even tend to legalize trusts or monopolies. It does tend to prohibit trusts and monopolies. *Robert H. Ingersoll & Bro.* v. *Hahne & Co. supra; Fisher Flouring Mills Co.* v. *Swanson,* 76 Wash. 649, 137 Pac. 144. Application of section 2 of the statute to the facts discloses that "Old Quaker" whiskey is in competition with other whiskies of like grade being sold in the Chicago market. No restraint rests upon the defendant inhibiting him from dealing in the competing goods of other products of the same general class sold by the plaintiff. He can freely sell whiskey at a lower price than the standard price for "Old Quaker." The statute merely prevents him from filching the good will associated with the descriptive mark and name of "Old Quaker" for his own ulterior purposes.

Horwich v. *Walker-Gordon Laboratory Co.* 205 Ill. 497, is cited, however, to support the defendant's position that the Fair Trade act violates the constitutional limitations against arbitrary classification. This court, in the case relied upon, held that the Trade-mark act of 1901 violated Section 22 of article 4 of our constitution. Section 2 of the statute declared it illegal for any person, without the written consent of the owner, to sell certain receptacles bearing the trade-mark, brand or name of the owner. Section 3 made the possession, by any junk dealer of receptacles bearing registered trade marks *prima facie* evidence that such possession was unlawful. The fourth section prescribed criminal penalties for the violation of the provisions of the act. An action was brought under section 6

which provided that any person might be enjoined from violating the second section. The court pointed out that the purpose of the statute was to facilitate the recovery of the receptacles described in the first section which had passed from the possession of their owners to others, and which the owners desired to recover summarily. On the other hand, the Fair Trade act of 1935 has for its major objective the preservation and protection of the property interest of the producer and his distributors in the good will represented by brands, trade-marks and trade-names. The law is also designed to protect the consumer's interests. The legislature by this act, has attempted to benefit alike the producer, the distributor and the public. It is apparent that the objective of the Fair Trade act is not some purely personal goal such as the summary recovery of certain types of personal property. The *Horwich case*, it is true, dealt with trade-marks but solely in their character as indicia of ownership. In the present case, the statute attacked deals not only with trade-marks in that respect but also with the good will built up by a producer or distributor around a trade-mark, trade name or brand, and provides that certain conduct with respect to the use of such trade-marks, names or brands constitutes unfair competition.

Connolly v. *Union Sewer Pipe Co.* 184 U. S. 540, is also invoked to sustain the defendant's position. The Illinois Trust act of June 20, 1893, prohibited trusts or combinations in restraint of trade or competition. Section 9 excepted from the provisions of the act agricultural products or livestock while in the hands of the producer or raiser. Section 10 provided that the purchaser of any article or commodity from such a trust or combination, should not be liable for the price and might plead the act as a defense to any action therefor. Suit was brought to recover for the sale of sewer pipe and the statute was pleaded as a defense. The United States Supreme Court held that the discrimination created by the ninth section rendered the act repugnant to the provisions of the fourteenth amendment respecting the equal protection of the laws. The defendant argues that no distinction can be drawn between the classification

condemned in the *Connolly case* and that provided by the Fair Trade act. The argument rests upon the premise that the Fair Trade act, in like manner as the Trust act of 1893, creates an unfair and arbitrary classification in flagrant violation of the constitutional guarantee of equal protection of the laws. It is urged that the new law attempts to legalize business practices which have long been deemed illegal under the Anti-Trust act. The arguments are based upon erroneous premises and therefore must fall. The Anti-Trust act was never intended to interfere with the protection given to the good will established around the use of a trade-mark, brand or name. Obviously, it does not even purport to render illegal the conduct sanctioned by the Fair Trade act. Moreover, a retailer such as the defendant is not expressly prohibited from removing the trade symbol and selling the whiskey, which he owns, at whatever price he pleases. Manifestly, there can be no interference with the enforcement of the Anti-Trust law under such circumstances.

An insuperable objection to the validity of the Fair Trade act, the defendant insists, is that the provisions of the statute are so incomplete, vague, indefinite and uncertain that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application. Statutes vulnerable to the objection stated have been declared unconstitutional as denying due process. *Champlin Refining Co.* v. *Commission,* 286 U. S. 210; *Parks* v. *Libby-Owens-Ford Glass Co.* 360 Ill. 130. On the other hand, where the words assailed, taken in connection with the context, are commonly understood, their use does not render a statute invalid. *People* v. *Huls,* 355 Ill. 412. Furthermore, the legislature is not required to define words in common and daily use. *People* v. *Lloyd,* 304 Ill. 23. A statute is sufficiently certain if the words and phrases employed have a technical or other special meaning well enough known to enable those within their reach to correctly apply them. *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497; *Omaechevarria* v. *Idaho,* 246 id. 343; *People* v. *Mueller,* 352 Ill. 124; *Amberson* v. *Amberson,* 349 id. 249; *Kowalczyk* v. *Swift & Co.* 329 id. 308. In the light of these

authorities the following words and expressions segrated and scrutinized by the defendant are not so ambiguous as to render the Fair Trade act void for uncertainty: "articles of standard quality" employed only in the title, the phrase "in fair and open competition" in section 1, the words "any commodity" and the expression "any contract entered into pursuant to the provisions of section 1" in section 2.

The remaining contention which requires consideration is that section 2 of the Fair Trade act contravenes section 1 of article 4 of the constitution of this State which provides that the legislative power shall be vested in the General Assembly. It is argued that section 2 delegates to such individuals as choose to avail themselves of the benefits of the statute the power to regulate the prices of commodities sold by others. The contention and the argument supporting it rest upon the unwarranted assumption that the Fair Trade act is primarily, and not incidentally, a price-fixing statute. In referring to the purpose of the California Fair Trade act, the Supreme Court of that State, observed that the statute did not merely prohibit price-cutting for the purpose of regulating prices but also prohibited the practice in a legitimate legislative attempt to afford protection to the validly-acquired rights of others. *Max Factor & Co.* v. *Kunsman,* supra. The Fair Trade act of this State does not even attempt to fix or delegate to others the right to fix the price at which any commodity may be sold in the market. It is true, however, that resale price maintenance laws such as the Fair Trade acts of California, New York and Illinois constitute permissive or conditional legislation. Specifically, our statute does not contain any mandatory requirements nor does it fix the prices which are to be imposed. No question of governmental price-fixing is, in consequence, involved. In other words, the law would remain wholly inefficacious unless the conditions which it prescribes are met. The plaintiff, for example, is not commanded to operate under it. Only in the event that manufacturers or distributors elect to avail themselves of its provisions does the statute come into actual operatoin. This does not mean that the act took

effect upon the approval of any authority other than the legislative branch of our State government. *Commonwealth* v. *Goldburg,* 167 Ky. 96, 180 S. W. 68. When the Fair Trade act was passed by the General Assembly it was a complete statute, in no manner dependent for approval or disapproval by any person or group of persons. The defendant's contention that the statute unlawfully delegates legislative power is without merit.

Two objections interposed in the trial court, namely, that the Fair Trade act violates the constitutional provisions against legislation impairing the obligation of contracts, and that it constitutes an invalid attempt to regulate the sale of commodities in interstate commerce have not been argued on this appeal. They do not, therefore, require consideration.

The decree of the trial court is right, and it will be affirmed.

Decree Affirmed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1936

No. 372

CARL W. McNEIL, DOING BUSINESS AS McNEIL'S LIQUOR STORE,
(Defendant) Appellant,

vs.

JOSEPH TRINER CORPORATION, A CORPORATION,
(Plaintiff) Appellee.

Brief of Appellant.

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IN THE

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CARL W. McNEIL, DOING BUSINESS AS
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vs.

JOSEPH TRINER CORPORATION, A CORPORATION,
(Plaintiff) Appellee.

Brief of Appellant.

I.

OFFICIAL REPORT OF OPINION BELOW.

The opinion of the Supreme Court of Illinois in this case is officially reported in Volume 363, Illinois Reports, Pages 559-582 and is printed at pages 14 to 34 in the Statement As To Jurisdiction and at pages 38 to 57 of the Record.

II.

STATEMENT OF THE CASE.

The Appellee filed its complaint under Section 2 of the Illinois Fair Trade Act (Smith-Hurd Illinois Revised Statutes, 1935, chapter 121½, sec. 188, *et seq.*; Illinois State Bar Revised Statutes, 1935, chapter 140, sec. 8, *et seq.*), for an injunction against the appellant to restrain him from wilfully advertising for sale, offering to sell or selling, at retail, in the city of Chicago, a certain brand of whiskey, said brand bearing the trade-mark, and trade name of "Old Quaker", at prices below a uniform retail price established in that city for said brand in various contracts entered into by retailers of the brand, other than the appellant, with their respective vendors, pursuant to the statute (R. 1-21). The statute is set out *in haec verba* on pages 4-6, *infra*. Upon the application of the appellee, an order was entered directing the issuance of a temporary injunction (R. 21). Thereafter the appellant filed his written motion to dissolve the temporary injunction and to dismiss the complaint for want of equity on the ground that it was substantially insufficient in law (R. 22-25). The sole point raised in the motion to dismiss was that the Fair Trade Act violated the State and Federal Constitutions.

The complaint alleges in substance: The appellee is a corporation engaged in business in the City of Chicago, Illinois, as a wholesale distributor selling to retailers for resale in that city various brands of liquors and alcoholic beverages of standard quality. The appellant is a retailer, engaged in said city in selling various brands of liquor and alcoholic beverages at retail (R. 1). The appellee sells at wholesale to retailers of said city certain liquors and

alcoholic beverages commonly known as "Schenley Products" which it purchases from a New York corporation, Schenley Distributors, Inc., which is licensed to do business in the State of Illinois, and is the sole sales and distributing agent of certain affiliated liquor distilleries known as the Schenley Distilleries. The appellee is one of ten wholesalers of Schenley products in the city of Chicago who are known as "local Schenley distributors." These local Schenley distributors are limited to that number and are the only ones selling Schenley Products at wholesale in the city of Chicago (R. 2).

The appellee has a considerable financial investment in its business. An important and valuable asset of said business is the good will of the retailers who purchase Schenley products from the appellee, and of the public and consumers who purchase said products in Chicago. The good will has been built up in part by the maintenance by local Schenley distributors and Schenley Distributors, Inc., of a uniform retail price for their products (R. 3). Schenley products consist of various brands of straight whiskeys, blended whiskeys, bonded whiskeys, gins, brandies, cordials, and rums. All of said brands at all times have been and are of standard quality or make. All of said brands are sold in bottles which have affixed thereon a paper label bearing the trade mark, duly registered with the United States Patent Office, of the producer of the product and the brand and name of the producer. One of said brands is known as "Old Quaker". Said brand of "Old Quaker" is in fair and open competition with commodities of the same general class sold at retail in said city, produced by persons other than said Schenley Distilleries (R. 4).

The complaint alleges in some detatil the peculiar characteristics of the market in liquor and alcoholic beverages and sets forth the beneficial effects of the maintenance of

uniform prices of liquors and the evil effects of price cutting (R. 4-7). In view of the position taken by the appellant that the statute under which this action is brought is invalid, we consider it purposeless to go more fully into this portion of the complaint.

Schenley Distributors, Inc., adheres to a business policy of securing to consumers a uniform and standard retail price fixed at an amount fair and reasonable to manufacturer, distributor and consumer for each brand of Schenley products sold in Chicago. The uniform and standard retail price for the brand known as "Old Quaker" is $1.89 per quart, 98c per pint and 50c per one-half pint. Schenley Distributors, Inc., in accordance with said business policy, suggests to the appellee and other local Schenley distributors a minimum retail price for which each of its brands should be sold at retail (R. 8). In the event that any distributor sells any brand of Schenley products to any retailer who is known by said distributor to sell any brand of Schenley products in Chicago at less than the uniform retail price suggested, Schenley Distributors, Inc. refuses to sell said products to said distributor (R. 9).

The complaint alleges the passage of the Fair Trade Act (R. 7-8) which is in words and figures as follows:

> "An Act to Protect Trade Mark Owners, Distributors and the Public Against Injurious and Uneconomic Practices in the Distribution of Articles of Standard Quality Under a Trade Mark, Brand or Name.
>
> Be it Enacted by the People of the State of Illinois Represented in the General Assembly:
>
> Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which

is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity; provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice stock price, at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Section 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Section 4. This Act may be known and cited as the 'Fair Trade Act.' "

After the enactment of the Fair Trade Act, the appellee to avail itself of the benefits of the Act, entered into contracts with the retailers, to whom it sells, which contracts contain a provision that said retailers would not resell said brands at retail in the City of Chicago except at the prevailing uniform and standard Schenley retail price. During the three months preceding the institution of suit, all sales of Schenley Products made by appellee to retailers were made under such contracts. Appellant knew of these contracts at the time that he engaged in the conduct hereinafter described. The other local Schenley distributors similarly entered into like contracts with their retailers, and the number of all retailers in Chicago selling under such contracts approximated 85% of all retailers selling Schenley products in that city (R. 9-10). As a result of the foregoing business policy certain beneficial consequences are alleged to have ensued (R. 10-11). We do not consider it material to describe these at length.

During the month of October, 1935, the appellant, Carl W. McNeil threatened to sell, offer for sale and advertise for sale, the brand of whiskey known as "Old Quaker" at a price lower than the stipulated uniform standard Schenley retail price. At the time of making such threats the appellant knew of the existing contracts to maintain the price of said brand. On October 16, 1935, the appellee informed the appellant of the business policy of the appellee and of its attempts to avail itself of the benefits of the Fair Trade Act by entering into said agreements, and requested the appellant not to sell, offer for sale or

advertise for sale at retail in Chicago said brand of "Old Quaker" below the uniform price. The appellee tendered to the appellant a form of printed agreement which it used in making sales of Schenley products to other retailers (R. 11-12). Said form of printed agreement is attached to the complaint as an exhibit (R. 18-20). The appellant refused to enter into such an agreement (R. 12).

On October 18, 1935, the appellant sold large quantities of the brand of "Old Quaker" at 77c per pint (the uniform price whereof was then 98c per pint) said appellant knowing at the time of the various contracts stipulating the uniform retail price. Thereafter the appellant was requested by appellee to cease underselling the uniform price, but the appellant asserted that he would not refrain from so doing (R. 13). As a result of the appellant's conduct a great number of other retailers located in the vicinity of the appellant's store threatened to violate their contracts with the appellee and to sell and offer for sale said brand of "Old Quaker" at the price of 77c or less per pint in order to meet competition. Several of the retailers did violate their contracts. The sales by said retailers at said price of 77c and below, it is alleged, did not yield said retailers a fair and reasonable profit and some of the retailers began to and did offer to the public substitute brands for "Old Quaker" when the public called for that brand. The appellee consequently suffered great loss and irreparable injury (R. 13-14).

On November 8, 1935, the appellant again offered to sell, advertised for sale and sold "Old Quaker" at 77c per pint. On that day the appellant displayed in the front window of his store bottles bearing the trade name and trade mark of "Old Quaker" and attached to the pane of said window, signs advertising said brand at 77c per pint. The uniform price was then 98c per pint, and appellant knew that (R. 14).

All of the quantity of "Old Quaker" sold by appellant was purchased by the appellant from various persons within the State of Illinois who kept and had said quantity in stock in said State prior to selling same to said appellant. Said quantity was not purchased from the appellee nor was it purchased under any of said Fair Trade agreements. Said quantity was purchased subsequent to the time when said Fair Trade agreements were entered into by the appellee and subsequent to the time that said appellant knew of the standard and uniform price for said brand fixed in said agreements. Said whiskey was not dealt in by appellant for the purpose of or in the course of closing out said quantity of said brand for the purpose of discontinuing delivery of said brand nor because said quantity nor any part thereof was damaged or deteriorated nor on account of or pursuant to an order of court (R. 14-15).

The complaint alleges that unless the appellant is restrained from selling below the uniform price great and irreparable injury to the plaintiff will result. The injury is specifically set forth. The amount of compensation which would afford relief to the appellee is alleged to be difficult of ascertainment. An injunction against the appellant is accordingly prayed (R. 15-17).

The motion of the appellant for a decree dismissing the complaint for want of equity on the ground that the complaint is substantially insufficient in law raises the sole objection that the Fair Trade Act is unconstitutional (R. 22-25). The specific objections are: A. The Act violates Article I, Section 8, of the Federal Constitution in that it attempts to regulate the sale of commodities in commerce among the several states. B. It violates Article I, Section 10, of the Federal Constitution in that it impairs the obligation of contracts (R. 22). C. It violates the due process clause of the Fourteenth Amendment to the Fed-

eral Constitution in that its provisions, terms and language are so incomplete, vague, indefinite and uncertain that the Act does not express clearly or intelligibly the subject matter attempted to be covered and the acts permitted, required or forbidden to be done thereunder, and provides for arbitrary classification of persons. D. It violates the Fourteenth Amendment to the Federal Constitution by denying to the defendant the equal protection of the laws (R. 23). E. It violates Article II, Section 2, of the Illinois Constitution by depriving the defendant of his property without due process of law. F. It violates Article II, Section 14, of the Illinois Constitution because it impairs the obligation of contracts. G. It violates Article IV, Section 1, of the Illinois Constitution in that it delegates legislative powers to private persons. H. It violates Article IV, Section 22, of the Illinois Constitution in that it grants special and exclusive privileges and immunities to certain persons while denying them to the defendant and persons similarly situated (R. 24-25).

The trial court held the statute constitutional and overruled the motion to dismiss the complaint. The appellant elected to abide by his motion and accordingly a final decree was entered granting a permanent injunction as prayed for in the complaint (R. 26-27). On an appeal taken directly to the Supreme Court of Illinois, the Supreme Court also held the statute constitutional and affirmed the decree (R. 38-58). The sole question presented to this Court is the constitutionality of the Fair Trade Act in the light of the Fourteenth Amendment to the Federal Constitution.

SPECIFICATION OF ERRORS.

(1) The Supreme Court of Illinois erred in holding that said Fair Trade Act is a valid exercise of the police power.

(2) The Supreme Court of Illinois erred in not holding that said Fair Trade Act is repugnant to the Fourteenth Amendment to the Constitution of the United States for the reason that it deprives the appellant of property without due process of law in that (a) its provisions, terms and language are so incomplete, vague, indefinite and uncertain, particularly in the use of the words "articles of standard quality", "commodities of the same general class", "in fair and open competition" and "any commodity", that said act does not express clearly and intelligibly the subject matter attempted to be covered and the acts permitted, required or forbidden to be done thereunder; (b) it deprives the appellant and persons similarly situated of vested rights in articles and commodities owned by them; (c) it delegates to persons not constituting the General Assembly of the State of Illinois the legislative power to determine the price at which commodities should be sold.

(3) The Supreme Court of Illinois erred in not holding that said Fair Trade Act is repugnant to the Fourteenth Amendment to the Constitution of the United States for the reason that it denies to appellant the equal protection of the laws in that it provides for arbitrary classifications of persons and commodities.

(4) The Supreme Court of Illinois erred in affirming the decree of the Circuit Court of Cook County, Illinois.

(5) The Supreme Court of Illinois erred in refusing to reverse the decree of said Circuit Court of Cook County, Illinois.

SUMMARY OF ARGUMENT.

I.

The Fair Trade Act deprives the appellant of his property without due process in that it vests in private individuals the arbitrary power to fix the price at which he may sell his property.

II.

The Fair Trade Act provides for arbitrary classifications of commodities which have no relation to the object sought to be accomplished and thereby violates Section 1 of the Fourteenth Amendment to the Federal Constitution.

III.

Section 2 of the Fair Trade Act delegates to persons not constituting the General Assembly, legislative powers and thus violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

1. Section 2 of the Fair Trade Act, in violation of the Constitution, delegates to any individuals who choose to avail themselves of that delegation, the power to regulate the prices of commodities sold by others.

2. The Fair Trade Act in delegating legislative power to private persons violates the due process clause of the Fourteenth Amendment.

IV.

The Fair Trade Act is couched in language so incomplete, vague, indefinite and uncertain that it fails to express clearly and intelligibly the subject matter attempted to be covered and the acts permitted, required or forbidden to be done thereunder, and thereby violates the due process clause of the Federal Constitution.

1. The title must be regarded as a part of the Act and considered in its interpretation.

2. Statutes which either forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application, violate the constitutional requirement of due process.

3. The phrase "articles of standard quality" in the title of the Fair Trade Act is vague, indefinite and uncertain.

4. The phrase "in fair and open competition" in Section 1 of the Fair Trade Act is incomplete, vague, indefinite and uncertain.

5. The term "any commodity" in Section 2 of the Fair Trade Act is vague, indefinite and uncertain.

6. The phrase "any contract entered into pursuant to the provisions of Section 1" in Section 2 of the Fair Trade Act is vague, indefinite and uncertain.

V.

An analysis of the opinion of the Supreme Court of Illinois in this case and of opinions of courts in other jurisdictions passing upon the validity of almost identical Fair Trade Acts, demonstrates that the sounder view considers the statute unconstitutional.

ARGUMENT.

I.

The Fair Trade Act deprives the appellant of his property without due process in that it vests in private individuals the arbitrary power to fix the price at which he may sell his property.

It is settled law that an unconstitutional deprivation of property does not necessarily mean a physical taking away of tangible property. The right to buy, sell, barter and exchange property is a necessary incident of ownership and the deprivation of this right is subject to the same constitutional limitations as is the taking of the property itself. More specifically, it has been judicially determined that the right of an owner to fix the price at which he may sell his property is protected by the due process clause.

Dr. Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U. S. 373; 55 L. Ed. 502, 31 S. Ct. 376;

People v. *Steele*, 231 Ill. 340, 83 N. E. 236;

Tyson v. *Banton*, 273 U. S. 418, 429, 71 L. Ed. 722.

The law is equally well settled that the rights of contract guaranteed by the Federal Constitution include the right to acquire and alienate property subject only to such conditions as the owner thereof may voluntarily assume.

Morehead v. *Tipaldo*, ... U. S. ....., 80 L. Ed. 921, 56 S. Ct. 918;

Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1, 71 L. Ed. 893, 47 S. Ct. 506, 52 A. L. R. 163;

Meyer v. *Nebraska*, 262 U. S. 390, 67 L. Ed. 1042, 43 S. Ct. 625, 29 A. L. R. 1446;
Adkins v. *Children's Hospital*, 261 U. S. 525, 67 L. Ed. 785, 43 S. Ct. 394, 24 A. L. R. 1238;
Adair v. *United States*, 208 U. S. 161, 52 L. Ed. 436, 28 S. Ct. 277;
Allgeyer v. *Louisiana*, 165 U. S. 578, 41 L. Ed. 832, 17 S. Ct. 427.

The appellant contends that the Illinois Fair Trade Act is in direct derogation of these unquestioned principles of law. The effect of the injunction issued by the trial court denies appellant the right to determine the price at which he can sell his own property. He has been forced by judicial command to accept the minimum resale price fixed by appellee in its contracts, not with appellant, but with other persons. His submission to appellee's price-fixing agreements with other persons is exacted, notwithstanding the fact that appellant did not acquire his property from appellee and that there is no privity of contract whatever between them. The tenuous ground upon which the Fair Trade Act permits the imposition of price-fixing arrangements entered into by private individuals upon third persons strangers to and unwilling to participate therein, is mere knowledge of such price-fixing arrangements. The Act is not limited in its application to persons learning of the price-fixing arrangements subsequent to the acquisition of property, but it is equally applicable to persons who acquire property in ignorance that there are price-fixing contracts in existence with reference thereto. Thus, the effect of the Act is to expose a purchaser of property to the hazard of an undisclosed and unascertainable restriction as to the price at which he can make a resale thereof. Further, the Act is not limited to the enforcement of price-fixing arrangements in existence at the time of the acquisi-

tion of the property: the Act is applicable with equal force if the price-fixing arrangements are made subsequent to the time that a third person may acquire property. All that is necessary is that knowledge be obtained prior to the time of resale. If this condition is met, a third person is at the absolute mercy of the price-fixers and he is required to surrender with reference to his own property, the right to determine a minimum resale price.

Not only does the Fair Trade Act permit the appellee to dictate to appellant the minimum price at which he may sell his property, but the power conferred upon the appellee and persons similarly situated is subject to no restraints, qualifications or limitations whatever. Having qualified as a person damaged by the Act because of the selling by a competitor at a price below the minimum price established by any contract, the price-fixers, although not the manufacturers of the commodity involved, nor the owners of the trademark which it bears, are granted unbridled discretion in enforcing their price dictates upon their competitors. The legislature has not subjected the price-fixers to any standards or controls of any kind in exercising their price-fixing function; the price-fixers are permitted to exercise their uncontrolled discretion in specifying minimum prices without any regard to the intrinsic worth of the commodity, its cost of production, or any consideration of what would constitute a fair and just return to the dealer thereof. The price specified may be motivated by caprice, malice or ignorance; it need not be uniform as to all persons similarly situated, or to any minimum number of them. The price-fixers are free to give notice of a minimum resale price to such dealers as they wish to subject to their price-fixing arrangements and to leave others free to sell the same merchandise at whatever price they see fit. Under the Act it is permissible for the price-fixers to enter into two or more contracts fixing different prices on iden-

tical merchandise and thereby creating a price differential among dealers in the same class. Moreover, once having fixed a price by contract and having notified retailers thereof, the price-fixers are free to enter into a subsequent contract fixing a lower price than the one stipulated by the first contract. In such event there is no requirement that the price-fixers give general notice of the change in price. This produces the manifestly unjust situation where a dealer selling his merchandise for the price specified in the first contract and which is no longer effective, is obliged to compete with others who enjoy the advantage of underselling him with impunity by knowledge of the second contract.

It is hard, we submit, to conceive of legislation which is more arbitrary in the purest and most realistic sense of the term. The vesting of such arbitrary power in private individuals is clearly repugnant to the due process clause of the Federal Constitution.

Yick Wo v. *Hopkins,* 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064;

Schechter Poultry Corporation v. *United States,* 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947;

Carter v. *Carter Coal Company and Others,* 298 U. S. 238, 80 L. Ed. 749, 56 Sup. Ct. Rep. 855;

Washington v. *Roberge,* 278 U. S. 116, 73 L. Ed. 210, 49 Sup. Ct. Rep. 50;

Eubank v. *Richmond,* 226 U. S. 137, 57 L. Ed. 156, 33 Sup. Ct. Rep. 76.

II.

The Fair Trade Act provides for arbitrary classifications of commodities which have no relation to the object sought to be accomplished and thereby violates Section 1 of the Fourteenth Amendment to the Federal Constitution.

The Fair Trade Act is vulnerable to attack on the ground that the classifications of commodities therein established are entirely inadequate to accomplish the purposes of the statute. The requirement that the specified commodities be in fair and open competition with other commodities is explainable only by the motive to insure that competition be unhampered and that monopoly be discouraged. The Act concededly purports to legalize only vertical and not horizontal price fixing and still condemns the creation of a monopoly. But the safeguard provided is futile. The requirement is that the commodities be in fair and open competition with commodities of "the same general class" produced by others.

In order to ascertain the meaning of "the same general class" we are compelled to consider the Trade Mark Statute of Illinois which is in *pari materia.* (See *People* v. *Wallace,* 291 Ill. 465, 470, 126 N. E. 175.) The Trade Mark Act (Illinois State Bar Revised Statutes, 1935, Chap. 140; Smith-Hurd Revised Statutes, 1935, Chap. 140) was amended at the same session of the General Assembly at which the Fair Trade Act was passed and sets up general classes of commodities not theretofore contained in the Trade Mark Act. Hence it is necessary to consider the two acts in conjunction with each other. (*People* v. *Wallace,* 291 Ill. 465, 470, 126 N. E. 175.)

Section 3 of the Trade Mark Act (as amended in 1935) establishes forty-nine specifically enumerated classes of

merchandise for the purpose of the statute and it must be assumed that in using the phrase "same general class" in another act passed at the same session concerning trade marks, the legislature referred to these forty-nine classes. Unless that assumption be conceded we are left without any guide in determining what constitutes the "same general class".

The forty-nine classes are as follows:

"(1) Raw or partly prepared materials.
(2) Receptacles.
(3) Baggage, animal equipments, port-folios and pocket-books.
(4) Abrasive, detergent, and polishing materials.
(5) Adhesives.
(6) Chemicals, medicines, and pharmaceutical preparations.
(7) Cordage.
(8) Smokers' articles, not including tobacco products.
(9) Explosives, firearms, equipment, and projectiles.
(10) Fertilizers.
(11) Inks and inking materials.
(12) Construction materials.
(13) Hardware and plumbing and steam-fitting supplies.
(14) Metals and metal castings and forgings.
(15) Oils and greases.
(16) Paints and painters' materials.
(17) Tobacco products.
(18) Vehicles, not including engines.
(19) Linoleum and oiled cloth.
(20) Electrical apparatus, machines, and supplies.
(21) Games, toys, and sporting goods.

(22) Cutlery, machinery, and tools, and parts thereof.
(23) Laundry appliances and machines.
(24) Locks and safes.
(25) Measuring and scientific appliances.
(26) Horological instruments.
(27) Jewelry and precious metal ware.
(28) Brooms, brushes and dusters.
(29) Crockery, earthenware, and porcelain.
(30) Filters and refrigerators.
(31) Furniture and upholstery.
(32) Glassware.
(33) Heating, lighting, and ventilating apparatus.
(34) Belting, hose, machinery packing, and non-metallic tires.
(35) Musical instruments and supplies.
(36) Paper and stationery.
(37) Printing and publications.
(38) Clothing.
(39) Fancy goods, furnishings, and notions.
(40) Canes, parasols, and umbrellas.
(41) Knitted, netted, and textile fabrics.
(42) Thread and yarn.
(43) Dental, medical, and surgical appliances.
(44) Beverages, nonalcoholic.
(45) Foods and ingredients of foods.
(46) Wines.
(47) Malt beverages and liquors.
(48) Distilled alcoholic liquors.
(49) Merchandise not otherwise classified."

Smith-Hurd Illinois Revised Statutes, 1935, Chap. 140, Sec. 3.

However, while this classification may be reasonable and necessary to effectuate the purpose of the Trade Mark Act,

which is to prevent confusion in trade, that same classification when appropriated bodily for the purposes of the Fair Trade Act, that is, to foster free competition, becomes signally inadequate. Selecting as an example, general class "(14) Metals and Metal Castings and Forgings", it is at once apparent that the mere fact that one specific metal is in competition with another specific metal will not necessarily prevent a monopoly. A producer of copper may compete with a producer of iron, aluminum, tin or other metal and yet not compete with another producer of copper. Hence, though within the purview of the Fair Trade Act, he will still have the power to fix an unfair price because of his monopoly.

This the Act does not contemplate. Most of the other forty-nine classifications could be similarly dissected to demonstrate that they provide ample latitude for the creation of a monopoly which is still the object of condemnation by the public policy of the state. And to climax the futility of the classification, number "(49) Merchandise not otherwise classified", steps forward to sanction single-handed more potential monopoly than the other forty-eight classes combined.

III.

Section 2 of the Fair Trade Act delegates to persons not constituting the General Assembly, legislative powers and thus violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

1. Section 2 of the Fair Trade Act, in violation of the Constitution, delegates to any individuals who choose to avail themselves of that delegation, the power to regulate the prices of commodities sold by others.

On the subject of legislative power to control prices, *Nebbia* v. *New York,* 291 U. S. 502; 78 L. Ed. 940, may well be considered the most important case decided by this Court since *Munn* v. *Illinois,* 94 U. S. 113. The principle enunciated in the *Munn* case that when property becomes clothed with a public interest its use may be controlled for the public good, is in the *Nebbia* case extended to permit the control of the price of a certain commodity not affected by a public interest in the strict sense of the phrase.

But the *Nebbia* case in not the slightest degree qualifies the rule that such price regulation must be in conformity with the doctrines heretofore announced as controlling legislatures in their regulation of industries hitherto clearly recognized as being affected with a public interest. It is to those decisions which define the limits of legislative delegation of the power to fix rates and charges of public utilities that we must look for guidance in determining whether (assuming for the moment that the legislature has the power to pass an act of this general character) the method adopted by the Fair Trade Act is valid.

The following rules concerning the rate- and price-fixing power of the legislature are by this time so firmly estab-

lished that they may be regarded as axiomatic: The power to regulate rates and prices, where such power is recognized, is legislative in character. This power cannot be delegated by the legislature to any commission, board or individual. The legislature may, however, delegate to a commission, board or individual administrative functions in the fixing of rates and prices. But in delegating these administrative functions, the legislative body must lay down primary rules of guidance for the administrative body so that discretion is reduced to a point where it cannot be considered that the administrative body has any legislative discretion.

Hampton & Co. v. *United States,* 276 U. S. 394, 407-9;

Interstate Commerce Commission v. *Goodrich Transit Co.,* 224 U. S. 194, 214;

Schechter v. *United States,* 295 U. S. 537, 79 L. Ed. 1570;

C. B. & Q. R. R. v. *Jones,* 149 Ill. 361, 377, 37 N. E. 247.

The Legislature must fix a primary standard for the guidance of the administrative instrument—*Buttfield* v. *Stranahan,* 192 U. S. 470, 496; the Legislature must lay down general rules of action under which the commission shall proceed—*Interstate Commerce Comm.* v. *Goodrich Transit Co.,* 224 U. S. 194, 214: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."—*Hampton & Co.* v. *United States,* 276 U. S. 394, 409; arbitrary power cannot be delegated by the Legislature—*People* v. *Sholem,* 294 Ill. 204, 208, 128 N. E. 377, and cases therein cited; a statute which subjects any person's rights to the discretion of an officer,

without any rules or provisions in the law to control the officer, violates the constitution—*People* v. *Sholem*, 294 Ill. 204, 209, 128 N. E. 377, and cases therein cited; laws conferring discretionary and arbitrary power upon persons not governed by any fixed rules or regulations, amount in effect to a delegation of legislative function.—*Noel* v. *People*, 187 Ill. 587, 591, 58 N. E. 616; an act which delegates administrative powers but which declares no policy, establishes no standard and lays down no rule, amounts to a delegation of legislative power—*Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 430. Abundant additional authority could be cited to the same effect.

Before applying the tests afforded by the foregoing cases to the Fair Trade Act, it will be instructive to examine the case of *Schechter* v. *United States*, 295 U. S. 495, 79 L. Ed. 1570, wherein the National Industrial Recovery Act was held unconstitutional because it delegated legislative functions to the President. The Court points out on page 533 the machinery set up for determining "unfair methods of competition" under the Federal Trade Commission Act:

> "A commission, a quasi-judicial body, was created. Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact, supported by adequate evidence and for judicial review to give assurance that the action of the commission is taken within its statutory authority."

The foregoing description of the procedure under the Federal Trade Commission Act is representative of the machinery provided by every *valid* enactment which delegates to a commission or official a charge-fixing power. The Fair Trade Act is unique in its failure to provide the customary safeguards. It should be noted that the act sustained by this Court in *Nebbia* v. *New York*, 291 U. S.

502, 78 L. Ed. 940, regulating the price of milk, established a milk control board, which was authorized to make investigation in order to determine the price which would best protect the milk industry, and yield a reasonable return to the producer and to the milk dealer, provided for hearing of interested parties and for review of orders by certiorari. Thus the New York Legislature adopted the usual and customary procedure for the protection of the affected parties.

But the Fair Trade Act, in flagrant disregard of all precedent, utterly and completely fails to set up any kind of machinery for the protection of those persons subject to the act. In so far as the Fair Trade Act permits persons to bind themselves to maintain certain price levels, we do not conceive that to be price regulation. It amounts merely to the removal of certain restrictions heretofore possibly imposed by the Anti-Trust Act upon the right to contract. But in so far as the act purports to affect persons not parties to the contracts, it is clearly and definitely regulation of prices. (*Doubleday, Doran & Co., Inc.* v. *Macy & Co., Inc.*, 269 N. Y. 272, 199 N. E. 409. See also the dissenting opinion in *Max Factor & Co.* v. *Kunsman*, 55 Pac. (2nd) 177 (Calif.).

The Supreme Court of Illinois, in its opinion rendered in this case, 363 Ill. 559, on page 581, concedes that the Fair Trade Act is a price-fixing statute but upholds it on the distinction that it is "incidentally, a price-fixing statute." This characterization of the act is not readily understandable in view of the effect of the act. The *purpose* of the act may be other than that of fixing price, namely, the protection of trade-marks, but the primary and sole method whereby this purpose is accomplished is by the fixing of resale prices. By the same reasoning of the court, a law regulating rates of public utilities is only incidentally a price-fixing statute because it has as its purpose

the protection of the public against exorbitant charges. The fallacy of this reasoning is apparent. No amount of characterization can talk away the fact that the statute deals only with prices, that it provides for fixing of prices against the will of the retailer, that it gives the right to fix prices to certain private persons, and the sole point of contention in this case is that the defendant has been enjoined from selling at any price except the one fixed. Does this bear out the assertion that the Fair Trade Act is "incidentally" a price-fixing statute?

The Act in effect appoints indiscriminately a multitude of fair trade commissions (?) consisting of vendors and vendees not less than two in number. These respective commissions (?) are vested with the power of fixing a minimum resale price of the particular commodity in which they trade, which price becomes the standard below which no person can sell his commodities. The Legislature has laid down no rules, regulations, conditions or principles by which these commissions (?) must be guided. The Legislature has not even stipulated the fundamental requirement *that such price be reasonable.* It has been held in *C. B. & Q. R. R. Co.* v. *Jones,* 149 Ill. 361, 377, 380; 37 N. E. 247, that vesting in an administrative board the power to set rates and to determine conclusively whether or not such rates are reasonable is an unconstitutional delegation of power. How infinitely more susceptible to attack is an act that vests in a commission (?) an arbitrary power to determine a charge, unhampered even by the mandate that such charge be reasonable. If the delegation of the lesser power be condemned, upon what theory can this broader delegation be sustained? Under the *Jones* case not even the Legislature would have the right to fix a price which was not reasonable. True, the declaration by the Legislature that the price which it fixed was reasonable would

be conclusive upon that point (subject to constitutional restrictions) yet its legislation would have to be founded on the theory that it was establishing reasonable prices.

Furthermore, the Fair Trade Act provides for no notice to interested parties; no opportunity to be heard is afforded; no right of appeal from the action of fixing prices is given—there is unequivocably and emphatically vested in vendors and vendees the unbridled, arbitrary power to determine conclusively the prices of specified commodities with total immunity from interference of governmental authority, legislative, judicial or executive. A deliberate attempt to draft an act which would defy every requirement of fundamental principles of price-fixing and delegation of such power could have produced no more thorough result than the Fair Trade Act.

By way of constructive criticism, we point to the Fair Trade Act of Wisconsin (Wisconsin Statutes, 1935, Sec. 133.25) which contains all of the provisions of the Illinois Act and among other additional sections provides as follows:

> "(7) (a) Upon complaint of any person that any contract containing the provisions referred to in Subsection (3) (this section corresponds to Section I of the Illinois Act) is unfair and unreasonable as to the minimum resale price therein stipulated, the department of agriculture and markets may in its diseretion serve by registered mail upon the parties to said contract notice of the time and place for a hearing on said complaint, at which hearing said parties shall show cause why the said contract should not be set aside. If upon such hearing the department of agriculture and markets shall find that such contract is unfair and unreasonable as to its minimum resale price provisions,

said department may by special order declare such contract to be in restraint of trade.

* * *

(c) Decisions in such cases shall be subject to judicial review as provided in Section 93.20."

We are far from admitting that the Wisconsin Act conforms to constitutional requirements. In most respects it is as defective as the Illinois Act. We do say, however, that the provisions of the foregoing sections of that act are several steps closer to the goal toward which the Fair Trade Act must work if it aspires to constitutionality.

2. The Fair Trade Act in delegating legislative power to private persons violates the due process clause of the Fourteenth Amendment.

In support of our contention that due process forbids the delegation of legislative power, we deem it sufficient to quote the language of this Court in *Carter* v. *Carter Coal Company and Others,* 298 U. S. 238, wherein the Court in condemning a delegation of legislative power to determine maximum hours of labor and minimum wages to a part of the producers and miners of coal, said (p. 311):

"The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. * * *

"* * * one person may not be entrusted with the power to regulate the business of another, and espe-

cially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *Schechter Corp.* v. *United States*, 295 U. S. at p. 537; *Eubank* v. *Richmond*, 226 U. S. 137, 143; *Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116, 121-122."

The Fair Trade Act falls squarely within the condemnation of the Court by providing for "legislative delegation in its most obnoxious form * * * to private persons whose interests may be and often are adverse to the interests of others in the same business."

IV.

The Fair Trade Act is couched in language so incomplete, vague, indefinite and uncertain that it fails to express clearly and intelligibly the subject matter attempted to be covered and the acts permitted, required or forbidden to be done thereunder, and thereby violates the due process clause of the Federal Constitution.

1. The title must be regarded as a part of the Act and considered in its interpretation.

Article IV, Section 13 of the Illinois Constitution provides:

> "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title."

The part that the title must play in the construction of the statute is defined in *People* v. *Fensky,* 297 Ill. 440, 130 N. E. 689. On page 443 of the official opinion the Court says:

> "The title must be regarded as a part of the act and considered in its interpretation, but the legislative intention must be found expressed in or implied from the words used in the body of the act *in connection with the title.*" (Italics ours.)

See also the following cases which require that the title of the act be considered in arriving at the intent of the legislature: *South Park Comrs.* v. *First Nat. Bank,* 177 Ill. 234, 238; 52 N. E. 365; *People* v. *Joyce,* 246 Ill. 124, 129, 92 N. E. 607.

Accordingly, in determining whether or not the Fair Trade Act conforms to the standards of definiteness prescribed by the authorities cited immediately hereafter, due recourse to the title of the Act is essential.

2. Statutes which either forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application, violate the constitutional requirement of due process.

This Court has had frequent occasion to pass upon the constitutionality of a statute challenged on the ground that it was so vague in language that it violated the due process clause of the Federal Constitution. It has consistently held that in order to constitute due process a statute must be so phrased that persons reading the same may with certainty determine just what acts are permitted, required or forbidden to be done thereunder. The terms used therein must have a certain and definite meaning. Standards of conduct must be fixed with precision. No person affected by the act must be compelled to guess at the meaning of the statute. These principles are applicable alike to statutes creating crimes or prescribing civil rights.

International Harvester Co. v. *Kentucky,* 234 U. S. 216;
United States v. *Cohen Grocery Co.,* 255 U. S. 81;
Small Co. v. *Am. Sugar Ref. Co.,* 267 U. S. 233;
Connally v. *General Const. Co.,* 269 U. S. 385;
Cline v. *Frink Dairy Co.,* 274 U. S. 445;
Smith v. *Cahoon,* 283 U. S. 553;
Champlin Refining Co. v. *Corporation Com.,* 286 U. S. 210.

The authorities touching upon the question of certainty of statutes are so exhaustively reviewed and the problem is so ably treated in the cases above cited that greater elaboration of authorities would be superfluous. It is manifest that each statute presents its own problem. As for the Fair Trade Act, an analysis thereof demonstrates that, tested by the foregoing rules, it lacks the certainty essential to its validity.

3. The phrase "articles of standard quality" in the title of the Fair Trade Act is vague, indefinite and uncertain.

In the title of the Fair Trade Act the legislature expresses an intention to control the distribution of "articles of *standard quality* under a trade mark, brand or name." While in the body of the act the qualifying words "standard quality," are omitted, yet it is imperative, to accomplish the purposes of the Act, that effect be given to the limiting phrase contained in the title. It would be productive of great hardship if there were permitted to be fixed the prices of commodities which fluctuated in quality. It is only reasonable to suppose that the prices would fluctuate in sympathy with the quality and that different contracts fixing the prices would successively be consummated. This would produce the harsh situation, should prices go up as a result of improvement in quality, of compelling retailers to ask the higher price for a product of inferior quality manufactured prior to the price change. That the legislature fully appreciated the necessity of permitting only articles of standard quality to be fixed in price is evidenced by the title. It would be an unwarranted disregard of an important element of the statute if it should be ignored and given no force and effect.

Unfortunately for the statute, however, the matter of standard quality was ended where it was begun. There is no word as to what is meant by "standard" quality. No measuring stick is created with which to gauge any commodity. With no fixed and definite standards established, who is to determine whether or not a commodity is of such quality as will permit its price to be fixed? Shall it be the distributor, producer, owner, vendor, vendee, or all of them? Or shall it be the Court or jury which tries a case arising under the Act?

Another difficulty is the failure to specify the time at which the standard is to be determined. Is it to be the quality that existed at the time the Act went into effect? Is it the quality that exists at the time a contract is entered into? Or is it the quality that exists at the time the commodity is sold by the producer? The Act throws no light upon these questions. Furthermore, with the constant evolution which occurs in the normal course of events, the probabilities are the quality of the commodity improves or deteriorates. If the quality improves and a new contract is consummated calling for a higher price, is the retailer, who is not a party to the contract, bound to conform thereto, even though he may have the commodity of inferior quality to sell?

It is apparent that the entire question of standard is so uncertain that it is impossible for the defendant to determine whether or not the contract which he is called upon to respect covers a commodity of "standard" quality within the meaning of the Act. He can merely indulge in fruitless conjecture and resign himself to the drastic conclusion that to avoid the perils of litigation he must abide by whatever price any producer or owner may fix, regardless of the quality of the commodity.

4. The phrase "in fair and open competition" in Section 1 of the Fair Trade Act is incomplete, vague, indefinite and uncertain.

As a prerequisite to the fixing of the price of any commodity the act provides that it must be "in fair and open competition with commodities of the same general class produced by others." The Act does not define "fair and open competition" and we must, therefore, look to the common law or other expressions of the legislature to ascertain, if we can, the meaning of that phrase.

The proper approach to a solution of the question appears to be a negative one. What is "fair competition" did not concern the courts until recently. Rather their concern lay with the definition of what constituted "unfair competition" and the method of granting relief therefrom.

In *DeLong Co.* v. *Hump Hairpin Co.*, 297 Ill. 359, 130 N. E. 765, on page 371 of the official opinion, the Court adopts as the meaning of "unfair competition" the definition offered by the United States Supreme Court in *Howe Scale Co.* v. *Wyckoff*, 198 U. S. 119, 140:

> "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

And in *Johnson Manf. Co.* v. *Johnson Skate Co.*, 313 Ill. 106, 144 N. E. 787, the Court, again confronted with the question, holds (p. 112):

> "* * * no trade-mark is necessary to entitle the complainant to an injunction, if the defendants' use of the name and of its marks, packages and devices and methods is such as is likely to deceive purchasers of the defendants' skates into believing they are buying the complainant's skates. Such use of the name, and of such marks, packages, devices and methods, amounts to unfair competition, and in such case the question is whether the use is of such a character as to deceive purchasers, with the result that the goods of the defendant company are palmed off as the goods of the complainant."

As a matter of common law, then, we have to work from, not a clear definition of what comprises "fair competition"

but simply an exposition of what constitutes "unfair competition". While it might be argued that by "fair" the legislature intended such competition as was not unfair in its legal significance, that intention is not clear.

Leaving for the moment the common law as an aid to determining the meaning of the phrase, and seeking statutory clarification thereof, we find that in 1934 there was passed by the Illinois legislature an act, the short title of which is the "State Industrial Recovery Act." (Approved May 14, 1934, L. 1933-4, Third Special Session, p. 182. Smith-Hurd Illinois Revised Statutes, 1935, Chap. 38, Sec. 246 a, *et seq.*) The stated purpose of the act was to cooperate with the Federal government in effectuating the policies of the National Industrial Recovery Act (approved June 16, 1933).

In Section 3 of the State Act, "fair competition" is defined as follows:

> "The terms and conditions of any code of fair competition which has been or may be approved pursuant to the terms of the National Industrial Recovery Act, and of any announcement and regulations modifying the same or for the licensing of business enterprises which have been or may be issued pursuant to the terms of said Act for any trade or industry or subdivision thereof, shall be the standards of fair competition for such trade or industry * * *. The terms and conditions of any agreement which has been or may be entered into pursuant to Section 4 (a) of Title I of said Act shall be the standards of fair competition for the person or persons entering into such agreement * * *. The violation within this state of any standard of fair competition shall be deemed an unfair method of competition and illegal."

Here, then, we have, ostensibly at least, a definition of the term "fair competition" in its affirmative and not merely negative aspect. But judicial actions susequent to the enactment of the state Industrial Recovery Act have played havoc with it. The National Industrial Recovery Act was declared unconstitutional in *Schechter* v. *United States*, 295 U. S. 495; 79 L. Ed. 1570.

It will be enlightening to quote from the opinion in the *Schechter* case wherein the entire question of fair and unfair competition is considered at length.

(p. 531) "What is meant by 'fair competition' as the term is used in the Act? Does it refer to a category established in the law, and is the authority to make codes limited accordingly? * * *

The Act does not define 'fair competition'. 'Unfair competition' as known to common law is a limited concept, primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. (citing cases)

(p. 532) In recent years its scope has been extended. It has been held to apply to misappropriation, as well as misrepresentations, to the selling of another's goods as one's own—to misappropriation of what equitably belongs to a competitor. * * * Unfairness in competition has been predicated of acts which lie outside the ordinary course of business and are tainted by fraud, or coercion, or conduct otherwise prohibited by law. * * *

But it is evident that in its widest range 'unfair competition', as it been been understood in the law, does not reach the objectives of the codes which are authorized by the National Industrial Recovery Act. The codes may, indeed, cover conduct which existing law condemns, but they are not limited to con-

duct of that sort. The government does not contend that the Act contemplates such a limitation. It would be opposed both to the declared purposes of the Act and to its administrative construction. • • •

(p. 542) We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

This Court has accordingly held, unanimously, that the phrase "fair competition" was susceptible of no clear definition. What possible defense can there be against the charge that the Illinois Fair Trade Act in its use of the identical phrase is void for lack of certainty? If the highest court in the land cannot define "fair competition" as used in the Act, it is the clearest violation of due process to impose upon persons affected by the Act the task of ascertaining at their peril, the meaning of that phrase.

Furthermore, with the code-making provisions of the National Industrial Recovery Act declared unconstitutional what is the status of the State Act? With its dependence upon the existence of a valid Federal statute, it is unquestionably rendered innocuous. But it has not been repealed and stands in the statute books of the State with its declaration of what constitutes standards of fair competition. Just how far is it operative, if at all?

To say the least, the situation is confusing and complex. And the Fair Trade Act imposes upon persons the task of determining in the midst of this confusion and complexity whether or not "open and fair competition" is present.

To add to the confusion, the Fair Trade Act itself injects another perplexing element into the puzzle by defining "unfair competition" as "wilfully and knowingly adver-

tising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1." If by "fair competition" in Section 1 is meant the antithesis of the term used in Section 2, and such would be a reasonable expectation, then fair competition would mean advertising, offering for sale or selling at the stipulated price. But this consists in lifting oneself by the bootstraps. It would be necessary to enter into a contract, fix the price, and sell at that price in order to enter into a contract to fix the price. Regretfully, therefore, we must relinquish the Fair Trade Act as a possible aid in ascertaining the legislative intention when it used the phrase "fair competition."

But even assuming, contrary to the holding of this Court, that somewhere in the common law or in the statutes of the State there exists a definite and certain meaning of the term "open and fair competition", we submit that the problem is still not solved. The entire law on this particular point deals with the acts of *persons* in the pursuit of their business. Thus, unfair competition constitutes acts of a merchant which violate certain principles of ethical behavior and fair competition constitutes compliance of the merchant with those principles.

The legislature, however, in a novel departure from the orthodox concept of fundamental principles, invests the inanimate commodity with a conscience. The requirement of the statute is that the *commodity* must be in fair competition with other *commodities* of the same general class. Obviously, commodities cannot compete with one another fairly or unfairly. If the statute is given a literal interpretation, it must fall because it is meaningless. An endeavor to place an interpretation upon this portion of the Act that would be sensible leads inevitably to the conclu-

sion that the *dealers* in the commodity are required to be engaged in fair competition. But such construction is also fatal to the validity of the Act. *There is no person designated by the Act as the one upon whose shoulders rests the responsibility of engaging in fair competition and thus determining whether or not the price of the commodity may be fixed.*

The Act refers to "distributors", "producers", "owners", "vendors", and "vendees". It can be readily seen that with the entire hierarchy of persons ranging from producer to retailer, the numerous combinations possible are legion wherein one or more persons of the several categories are engaged simultaneously in fair competition and unfair competition, with reference to the same commodity. And in each of these possible situations, whose conduct will it be necessary to observe in determining whether or not the commodity is in fair and open competition? The Act is woefully silent on that score! And so is the decision of the Supreme Court of Illinois in this case, which nowhere offers any definition of the phrase "fair competition" although the charge was made and argued that it was so vague and uncertain that it violated the due process clause.

5. The term "any commodity" in Section 2 of the Fair Trade Act is vague, indefinite and uncertain.

The charge of ambiguity can be leveled also at the expression of the duty placed upon the retailer, that is, he must not advertise, offer for sale or sell "any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1 of this Act whether the person so advertising, offering for sale or selling is or is not a party to such contract."

It is impossible to conceive of a broader restriction than is contained in the foregoing extract from the statute.

The commodity affected is not limited to the one covered by the contract. The clear expression of the statute is that "any commodity" must not be sold below the stipulated price. A literal reading of the statute would mean that if the price of whiskey were fixed at $1.89 per quart, a retailer (for example, a department store owner) who sold also candy or salt or, in fact, any commodity other than whiskey could not sell that commodity below $1.89 per quart. Obviously a ridiculous, but literal interpretation of the statute. No doubt the legislature meant to say (but in fact did not) that the retailer could not sell the particular commodity covered by the contract below the stipulated price. But even under that interpretation, the duties are not clear. Assume that the price fixed is per certain unit of measure, as in the case of whiskey, the quart and the pint. Does that mean that only sales in that particular quantity are to be sold at the stipulated price? What of sales in other quantities—as by the glass. Must the price be proportionate? And if so, proportionate to what—the quart or the pint? From the complaint we see that there are two standards, the price per pint being proportionately higher. In the other direction, what would be the price per gallon? Or is there to be no restriction on the sales per glass, per gallon or per measure other than the measure stipulated in the contract? Again the retailer is tossed upon a sea of speculation as to the nature and extent of his obligations.

6. The phrase "any contract entered into pursuant to the provisions of Section 1" in Section 2 of the Fair Trade Act is vague, indefinite and uncertain.

The Act imposes upon a retailer the burden of abiding by the price stipulated in "any contract entered into pursuant to the provisions of Section 1." There is no re-

straint placed upon anybody regarding the number of contracts that may be entered into. Any buyer and any seller, be he producer, wholesaler, distributor or retailer, may enter into a contract. There may be more than one contract affecting the price of the identical commodity, and the prices stipulated in the contracts may be as diverse as the number of different contracts. Which one must a person respect?

No provision is made for superiority in efficacy because of priority in time or character of contracting party. Suppose one contract is entered into between a distributor and a retailer. Assume another contract covering the identical commodity is agreed upon between a second distributor and another retailer fixing a higher resale price. Is the first retailer, upon being notified of the second contract, bound thereby despite the fact that he is already party to a contract giving him the right to resell at a certain price? The plight of a stranger to both contracts is still more pathetic. Is he to be governed by the first contract or by the second? Two contracts are sufficient to throw him into confusion. Multiply the number of contracts to the unlimited extent permitted under the Act and we find him wandering about in a maze of conflicting contracts and prices from which the statute offers him no avenue of escape.

The opinion of the Supreme Court of Illinois, reported in 363 Ill. 559, throws no light upon the problems herein raised. The Court contents itself with the bare assertion that the phrases attacked are not ambiguous.

* * *

Enough has been pointed out to demonstrate that the statute is carelessly drawn and is so replete with vagueness, indefiniteness and uncertainty that no person, including the

appellant, can possibly hope to arrive at a clear and intelligent understanding as to what duties have been imposed upon him by the statute. The law is not definite and certain enough to enable every person, by reading the law, to know what his rights and obligations are and how the law will operate when put into execution.

V.

An analysis of the opinion of the Supreme Court of Illinois in this case and of opinions of courts in other jurisdictions passing upon the validity of almost identical Fair Trade Acts, demonstrates that the sounder view considers the statute unconstitutional.

In the case of *Doubleday Doran & Co., Inc.* v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272, 199 N. E. 409, the court of last resort of the State of New York without dissent held unconstitutional the New York Fair Trade Act which is almost identical with the Illinois Fair Trade Act. On the other hand, in *Max Factor & Co.* v. *Kunsman*, 55 Pac. (2nd) 177 (Calif.), the California Fair Trade Act, which is also almost identical with the Illinois Fair Trade Act, was held constitutional by the California Supreme Court. In this case there were two dissenting opinions.

The New York decision rejects the statute on the ground that it involves an unlawful delegation of legislative authority. That this conclusion is sound and amply supported by authority is clear from the argument made by appellant in this brief under his Point III.

The California decision confines itself to a consideration of whether or not the police power of the State extends to a point where it permits regulation of the price of commodities "not affected with a public interest" and con-

cludes that it does. Beyond that conclusion the California court does not go. Assuming for the sake of argument that the *Nebbia* case is sufficient warrant for the exercise of power by the legislature in the enactment of the Fair Trade Act, the California decision falls into the error, once it has determined that the statute is a price-fixing statute, of not recognizing the fact that vesting the price-fixing power in the producer, distributor or owner is an unconstitutional delegation of power. The New York decision correctly takes cognizance of this feature of the act. As has heretofore been argued, this delegation of power results in a denial of due process and consequently contravenes the Fourteenth Amendment to the Federal Constitution.

The decision of the Supreme Court of Illinois considers the question of delegation of power but concludes that the act does not provide for an unlawful delegation. Basing such conclusion on the distinction that the statute is only incidentally a price-fixing statute, the unsoundness of this reasoning has heretofore been argued under our Point III.

The decision in the California case furthermore is distinguishable from the case at bar in that the California court was not presented with or at any rate did not consider the charge that the due process clause of the Constitution has been violated by the vesting of arbitrary powers in private persons (see appellant's brief hereinabove Point I). As for the decision of the Supreme Court of Illinois, while that court was presented with this argument, it did not give effective answer thereto but in its treatment of that phase of the argument confined itself to a determination generally of the power of the legislature to enact a law of this nature. The specific charges that arbitrary powers were vested in private persons were not treated.

Another reason why the decision of the California court should not be considered pursuasive is that it fails to consider the violation of the due process clause occasioned by the vagueness, uncertainty and unintelligibility of certain phrases (see Point IV of our brief hereinabove). We have already pointed out that the Supreme Court of Illinois in its consideration of this argument failed to offer any clarification of the phrases which were attacked as being unintelligible.

The force of the California decision is considerably weakened by the two vigorous dissenting opinions. Mr. Justice Thompson soundly refuses to uphold the constitutionality of the act on the grounds that first it transcends the power of the legislature, and secondly it delegates legislative authority. We commend the dissenting opinion of Mr. Justice Thompson to the earnest consideration of this Court.

The appellee in this case attempted to distinguish the New York decision from the case at bar on the facts and relied upon the principle that a statute may be unconstitutional as applied to particular situations while constitutional as to others. The Supreme Court of Illinois agreed with this contention and held that the instant case was distinguishable from the New York case.

However, viewing the factual situation in both cases *in its essence* we find that both cases involve a contract entered into between a distributor of a trade-marked commodity of alleged standard quality (?) which is in alleged fair and open competition (?) with other commodities, which contract fixes the resale price that appellant, a party not in privity although knowing of the contract but expressly refusing to enter into the same, is compelled to observe. *These are the only facts which it is necessary to consider because these are the only facts which the statute*

requires to exist to give rise to the cause of action alleged in the complaint. All other allegations of fact in the complaint are superfluous. The plaintiff cannot frame a complaint in such elaborate fashion that factually it presents a situation which if provided for by the statute would conform to constitutional requirements. That, we submit, does not comprise a constitutional application of a statute but consists in the invention of a cause of action which is essentially different from the one created by the Fair Trade Act. We insist that only such facts as are required by the statute to exist can be considered. Plaintiff cannot cure the defects in the Act by supplementing the necessary allegations with sufficient other facts to overcome any objectionable aspects of the statute.

But even considering all of the allegations contained in the complaint, both essential and superfluous, we contend that the appellant is being deprived of the protection of the Fourteenth Amendment. The fact still remains in this case that the legislative power to fix prices has been delegated to the appellee and the persons with whom it entered into a contract, contrary to the appellant's constitutional right to have the legislative power exercised by the legislature, thereby depriving him of due process; secondly, the fact still remains that the appellant is deprived of due process because an arbitrary power has been vested in the appellee, (1) to set a resale price without restrictions of any kind whatsoever; (2) to notify the appellant and other retailers of such price, or to refrain from so notifying at its discretion, or to notify some retailers and not notify others, thus determining arbitrarily to whom the law shall apply; and (3) to enter into other contracts providing for a lower resale price without notifying the appellant of such reduction. And finally the fact still remains that the appellant is subjected to an Act which is so unintelligibly

phrased that he cannot determine what he is required, permitted or forbidden to do thereunder.

CONCLUSION.

We respectfully submit that the Illinois Fair Trade Act should be held unconstitutional and the judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1936

No. 372

CARL W. McNEIL, DOING BUSINESS AS
McNEIL'S LIQUOR STORE,
(Defendant) Appellant,

vs.

JOSEPH TRINER CORPORATION, A CORPORATION,
(Plaintiff) Appellee.

Brief of Appellee.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1936

No. 372

CARL W. McNEIL, DOING BUSINESS AS
McNEIL'S LIQUOR STORE,
(Defendant) Appellant,

vs.

JOSEPH TRINER CORPORATION, A CORPORATION,
(Plaintiff) Appellee.

Brief of Appellee.

The official report of the opinion rendered below by the State Supreme Court is 363 Ill. 559 (R. 38). The opinion is also reported in 2 N. E. (2d) 929 and 104 A. L. R. 1452. The latter report is annotated.

The statement of facts, as contained in the opinion, is adopted herein and, for brevity's sake, will not be repeated (R. 39-43).

SUMMARY OF ARGUMENT.

The construction which the Illinois Supreme Court has placed on the terms of the Illinois Fair Trade Act makes the various definitions and interpretations of that court a part of the statute itself in determining the constitutionality of the statute.

The act was adopted for the purpose of protecting the good will of producers and distributors who market commodities of standard quality, under a trade-mark, brand or name, in fair and open competition with like commodities produced by others. The act also has as its purpose the prevention of the unfair advantage which is taken of consumers through the use of leader advertising, the safeguarding of the public from the debasing of the quality of goods sold under a trade-mark, brand or name as a result of a price demoralization, the conservation of brands which might be driven from the market by the cut of their price, and the elimination of monopolistic tendencies which occur when brands are destroyed by price-cutting or when retail outlets for a commodity become unavailable.

The means provided by the Legislature for the achievement of these purposes is the granting of permission to producers or distributors who market goods which are in fair and open competition with other goods of the same general class, to restrict the use of their trade-mark, brand or name in cut-price transactions, by entering into vertical resale price maintenance contracts with all persons in their distributive system and the subjection of any person, whether a party to such a contract or not, who wilfully and

knowingly sells, under the trade-mark, brand or name at a price less than that stipulated in such contracts, commodities which he has acquired with knowledge of such vertical resale price maintenance system, to an action for unfair competition, at the instance of any person damaged thereby.

The cases at common law recognized that a trade-mark owner or his distributor had by virtue of his trade-mark, an interest which justified restriction of the resale of his trade-marked commodity at cut prices in instances where such conduct would injure his good will. While these cases did not protect the good will in a trade-mark, brand or name from injury through the price-cutting of persons who were neither parties to the vertical resale price maintenance system, nor induced a breach of a contract of that system, cases dealing with patents, copyrights and secret processes, resting on an erroneous construction of the patent and copyright acts and by analogy the secret process law, developed rules by extending common law principles of contract law such as the third party beneficiary and inducing breach of contract concepts, which by analogy, could be applied in the field of trade-marked goods to afford the protection needed to preserve the good will of the trade-mark of the producer or his distributor and to safeguard the public from the injuries of price-cutting. The Illinois Fair Trade Act, as construed by the Illinois Supreme Court, adopts the principles developed in the patent, copyright and secret process cases, in so far as they are applicable to the restriction of the use of a trade-mark, brand or name in a cut-price transaction and makes the conduct of third persons who with knowledge of the vertical resale price maintenance system use the mark in a cut-price transaction, actionable as unfair competition.

The Legislature of a state may by the exercise of its police power, enact laws for the purpose of protecting trade-marks, trade-names and brands, safeguarding the public from injurious forms of advertising, preserving brands and their accessibility for consumers, and eliminating practices which lead to monopolies and trusts.

The granting of a right to producers of commodities which compete fairly in the market, and their distributors, to exclude, through the adoption of vertical resale price maintenance contracts and through the enforcement thereof by injunction or common law damage suits, the use of their trade-mark, brand or name in cut-price sales by either persons to such contracts or third persons who do not enter into such contracts but who acquire the trade-marked, branded or named goods with knowledge of such contracts, is a proper means to achieve the purposes of the Fair Trade Act. Allowing a producer or his distributor to restrict the use of the trade-mark, brand or name by vertical resale price maintenance contracts in such instances and by such means does not, even when such a restriction is imposed on a non-contracting party, involve a delegation to private persons of the power to legislate in derogation of the property rights of others.

The Illinois Fair Trade Act, as construed by the Illinois Supreme Court, and as understood in the light of its historical background and current business experience, is sufficiently definite in provision not to violate the due process of law clause of the federal constitution.

The decision of the Illinois Supreme Court in the instant case does not deprive the appellant of his property without due process of law. He is free to sell his whisky at any price he pleases so long as he does not use the trade-mark and trade-name "Old Quaker." He may use that

mark and name if he sells at not less than the price observed generally by other retailers and established as the standard and uniform price by appellee in contracts with its retailers. Appellant purchased the whisky in question subsequent to the adoption of the Fair Trade Act and with full knowledge of the system of contracts which appellee and other distributors had entered into for the purpose of restricting the use of the trade-mark and name "Old Quaker." The appellant is free to sell the whisky under the trade-mark and name "Old Quaker" if he wishes to discontinue stocking "Old Quaker" and first offered to resell the whisky to appellee or the producer at appellant's invoice price.

ARGUMENT.

I.

The Illinois Fair Trade Act, As Construed By the Supreme Court of Illinois.

The various arguments which have been urged in this Court in support of the asserted unconstitutionality of the Illinois Fair Trade Act under the Fourteenth Amendment, rest for the most part either upon a misapprehension of the construction placed upon the statute by the Supreme Court of Illinois or upon a failure to recognize that under the established rule, the interpretation made by the Illinois court, and not other possible interpretations, is conclusive of the meaning of the statute. *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32, 34, 35. It is wholly immaterial to the issue how the highest court of some state other than Illinois may have construed a statute of identical language, or whether those here challenging the Act differ with the Illinois court on the proper interpretation to be given it. *Louisiana* v. *Pillsbury,* 105 U. S. 278, 294; *Marine* v. *Kalt, Zimmers Co.,* 293 U. S. 357, 363, 366. The extent and limitations of a statute and the method by which they shall be determined rest with the state court. *Smiley* v. *Kansas,* 196 U. S. 447, 454, 455. In determining the constitutional question, the statute is to be considered as though the construction placed upon it by that court was part of its text.

The Illinois Fair Trade Act, *Ill. Rev. Stats. 1935, Ill. State Bar Ass'n, Ed., ch. 140 pars. 8-11; Smith-Hurd Ill.*

Rev. Stats. 1935, ch. 121½, secs. 188-191, has been interpreted* by the Supreme Court of Illinois in two decisions: the instant case, *The Joseph Triner Corporation* v. *Carl W. McNeil,* 363 Ill. 559, 2 N. E. (2d) 929 (R. 38) and *The Seagram-Distillers Corporation* v. *The Old Dearborn Distributing Company,* 363 Ill. 610, 2 N. E. (2d) 940, pending on appeal before this Court at the current term. The opinions of the state court in both of these cases, each written by a different member of the court and concurred in by all of the justices, explain clearly the purpose of the statute and the meaning of its terms.

Those here opposing the Act urge, as they did at each of the successive stages in the proceedings below, that the purpose of the statute is to permit price-fixing; that the aim is no different in this respect from that of legislation which confers upon some administrative board power to regulate the resale price of commodities, except that, in this instance, such power is not vested in a governmental agency but has been delegated to private persons who care to come within the Act.

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*The act was the subject of decision by the Appellate Court of Illinois in two cases decided November 4, 1936, *Old Fort Dearborn Wine & Liquor Co.* v. *Old Dearborn Distributing Co.* reported in Commerce Clearing House Federal Trade Regulation Service, ¶ 25002 and *same* v. *same ibid.* ¶ 25003. Both cases involved appeals from interlocutory injunctions entered by the lower court under the act to restrain price-cutting in order to maintain the *status quo* and prevent imminent destruction of retailer and consumer good will. The Appellate Court in both cases unanimously affirmed the issuance of the writ. That court is the highest state court having jurisdiction to review interlocutory appeals. The act has also been the subject of an opinion by a state *nisi prius* court in the instant case (R. 27-37).

The Illinois Court in its opinion in the instant case denied that the legislative intent was price-fixing, as such, and defined the purpose of the Act as being three-fold: *First*, to protect, in the public interest, the good will which a producer and his distributor have built up around a trade-mark, trade-name or brand, from the destructive effects of price-cutting; *second*, to safeguard the public against the injurious consequences of price-cutting, such as the sale of inferior goods to consumers who are attracted by the obvious bargain presented in the "cut" or "bait" price and who are misled into believing that such price is typical of the seller's ability to sell quality goods generally at low prices, and the destruction of the favored brand either by causing it to be driven off the market or making it necessary that the producer allow its quality to fall in order to keep it there or by contracting the number of retail outlets that will handle the brand and thereby ending its accessibility; and *third*, to protect the producer, distributor and public against the creation of trusts and monopolies in the field of distribution.

The State Supreme Court commenced its opinion below by calling attention to the purpose of the Act as defined in the title, saying (R. 38):

> "The title of the statute expresses its purpose as 'An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade-mark, brand or name.'"

Later in the opinion, the court itself undertakes to state, generally, the purpose of the statute, using the following words (R. 54):

> "* * *, the Fair Trade act of 1935 has for its major objective the preservation and protection of the prop-

> erty interest of the producer and his distributors in the good will represented by brands, trade-marks and trade-names. The law is also designed to protect the consumer's interest. The legislature by this act, has attempted to benefit alike the producer, the distributor and the public. It is apparent that the objective of the Fair Trade act is not some purely personal goal * * *."

With regard to the assertion that the aim of the statute is bare price-fixing, the court said (R. 56):

> "It is argued that section 2 delegates to such individuals as choose to avail themselves of the benefits of the statute the power to regulate the prices of commodities sold by others. The contention and the argument supporting it rest upon the unwarranted assumption that the Fair Trade act is primarily, and not incidentally, a price-fixing statute. In referring to the purpose of the California Fair Trade act the Supreme Court of that State observed that the act did not merely prohibit price-cutting for the purpose of regulating prices but also prohibited the practice in a legitimate legislative attempt to afford protection to the validly-acquired rights of others. *Max Factor & Co.* v. *Kunsman, supra.*"

And more directly, it was said (R. 56):

> "* * * Specifically, our statute does not contain any mandatory requirements nor does it fix the prices which are to be imposed. No question of governmental price-fixing is, in consequence, involved."

Further recognition by the court that one of the purposes of the Act was to accord protection, in the interest

of the public, to the property rights of producers and their distributors in the good will established about a trade-mark, trade-name or brand, appears in the following statements which were made:

> "The gist of the theory is that the manufacturer of a trade-marked article, sold in competition with articles of similar nature, who has designated a fair price at which he, as well as the distributor and retailer, can make a fair profit, has a property right in the good will towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others * * *" (R. 44-45).
>
> "The manifest legislative intent is the protection of the property interest in a mark, name or brand by preventing the use of the symbol by price-cutting retailers in ways likely to depreciate the property interest." (R. 52).
>
> "The statute * * * prevents * * * filching the good will associated with the descriptive mark and name * * * for * * * ulterior purposes." (R. 53).
>
> "* * * the statute attacked deals * * * with the good will built up by a producer or distributor around a trade-mark, trade-name or brand, and provides that certain conduct with respect to the use of such trade-marks, names or brands constitutes unfair competition." (R. 54).

That the aim of the statute is to protect the public against injurious consequences arising from the price-cutting of branded commodities, was likewise further indicated by the court. Thus, with regard to consumers being

misled into purchasing inferior goods because of a debased price on some marked commodity, it was said (R. 45-46):

> "The Fair Trade act is intended to curb one of these practices by protecting the manufacturer who has built up a brand or article based on quality and excellence and preventing its use as a 'loss leader' by those who would sell it for the purpose only of inveigling the public into patronizing their places of business in the hope of obtaining a profit on other goods of inferior quality."

Again, (R. 45):

> "* * * it is sound public policy to protect that property right [the good will which has been created for a brand] against destruction by others who have no interest in it except to employ it in a misleading manner for the purpose of deceiving the public." (Words in brackets added)

And, emphasizing the unfairness of the bait use made of the good will, as illustrated in the present case (R. 52-53):

> "As applied to the present case, by using the trade-name of a well known liquor the defendant, in effect, attracts the public to his store and thereby induces the visitors to become the purchasers of other goods offered for sale. The defendant thus benefits at the expense of the trade-name 'Old Quaker', by using the plaintiff's products as a means to draw trade."

That price-cutting destroys good will (and consequently the brand dependent for its success upon the good will) and that such destruction affects adversely the public interest (R. 45):

> "* * * it is sound public policy to protect that property right [good will in a mark] against destruction

> * * *. 'The basic theory * * * is that, from a social standpoint, price-cutting, in the long run, adversely affects the public interest, * * *.'" (Words in brackets added)

And (R. 52):

> "* * * it is * * * in reference to those commodities included within the statute that the manufacturer or producer has a property right in the nature of good will, which, in the public interest, should be protected."

The way in which a brand may be destroyed by price-cutting is shown by the facts of the case to which the opinion below adverts and which need not here be re-stated (R. 39-43). However, in one instance, in the course of its opinion, the court pointed out that (R. 52):

> "Such competitors [retailers who cut popular brands] could also destroy a commodity built on merit by underselling, and thus destroying the purpose of the label intended to signify quality." (Words in brackets added)

The aim of the statute, to protect producers, distributors and the public by preventing the rise of trusts and monopolies in the field of distribution, was pointed out by the court during the course of its discussion of the state anti-trust law. The court said (R. 53):

> "The statute clearly does not even tend to legalize trusts or monopolies. It does tend to prohibit trusts and monopolies. *Robert H. Ingersoll & Bro.* v. *Hahne & Co., supra; Fisher Flouring Mills Co.* v. *Swanson,* 76 Wash. 649, 137 Pac. 144."

The provision made by the Illinois Fair Trade Act to effectuate its purposes is principally an adoption of what

has been known to courts for over fifty years as the contract system of vertical price maintenance of trade-marked or branded commodities. Under such a system, to prevent injury to the producer, his distributor and the public, by price-cutting, all retailers who purchase the commodity in the regular marketing channel, agree with some person in the distributive line (producer, producer's sales agent, wholesaler, jobber, etc.) not to sell the commodity under the mark, name or brand it bears, at a price below that established by the producer, or his distributor, as the minimum price for which the commodity is to be sold to the consumer in the particular market. Contract systems vary with different marketing methods, and some systems may be quite intricate, but all have as their essential feature the establishment of a uniform minimum retail price by means of vertical agreements entered into with all retailers.

Section 1 of the act is declaratory of the legality of types of contracts employed by producers, or their distributors, in establishing a vertical resale price maintenence system. The section provides that any contract relating to the sale, or resale, of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer of the commodity and which commodity is in fair and open competition with commodities of the same general class produced by others, shall not be deemed in violation of any law of the State of Illinois by virtue of its containing a provision stipulating a resale price for which the commodity shall be resold under the mark, name or brand.

The contracts referred to in Section 1 are vertical resale price maintenance contracts and not horizontal ones. A reading together of sections 1 and 3 of the Act indicates that the contracts mentioned in section 1 are those entered

into between persons standing at different levels in the distributive line. Such was the construction of the state court below (R. 39):

> "The Fair Trade act • • • permits vertical resale price maintenance but condemns, as do the Federal and State Anti-Trust laws, horizontal arrangements for fixing prices."

And, later in the opinion (R. 53):

> "The only resale price maintenance, if any, permitted by the Fair Trade act is vertical. Vertical price maintenance merely enables a producer, or his distributor, to set a price at which the trade-marked commodity shall be sold to the consumer. • • • Section 3 declares that the act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. In short, it does not apply to horizontal price maintenance."

In the case of *The Seagram-Distillers Corp.* v. *Old Dearborn Distributing Company*, 363 Ill. 610, 614, 2 N. E. (2d) 940, 942, the court below again said:

> "Contracts between plaintiff [a wholesaler having the exclusive right to purchase the commodity from the producer for resale in Illinois] and wholesale distributors, or between distributors and retailers, are denominated vertical price-fixing contracts • • •. Contracts between producers or between wholesalers or between retailers as to sale or resale prices, are denominated horizontal price-fixing contracts and are not within the terms of the statute because of their character as combinations in restraint of trade." (Words in brackets added)

The stipulation for resale price maintenance contained in the contracts mentioned in Section 1, is a stipulation fixing the retail price only in the event that the commodity is resold under the trade-mark, trade-name or brand it bears, and not one which fixes unconditionally a resale price regardless of whether the commodity is resold under the trade symbol. As the court below said (R. 52):

> "The Fair Trade act does not assume to permit restrictions on the price at which trade-marked commodities may be resold, irrespective of whether it is resold under the trade-mark. It permits restrictions to be placed on the *use* of trade-marks, names and brands, not restrictions on the price of commodities generally • • •."

With the same thought in mind, the court said (R. 54):

> "• • • the statute • • • provides that certain conduct with respect to the use of such trade-marks, names or brands constitutes unfair competition."

And also said (R. 55):

> "• • • a retailer such as the defendant is not expressly prohibited [by virtue of the resale price maintenance contract] from removing the trade symbol and selling the [commodity] • • • at whatever price he pleases." (Words in brackets added)

The commodity referred to in Section 1 is, as stated in the title of the statute, an article of standard quality, that is, a commodity which is sold in units each of identical character. The commodity furthermore must be one which is in fair and open competition with commodities of the

same general class produced by others. As was said below (R. 53):

> "Section 1 specifically provides that a commodity in order to be subject to the contracts permitted under the Fair Trade act must be 'in fair and open competition with commodities of the same general class produced by others.'"

The expression "in fair and open competition with commodities of the same general class produced by others" is to be understood and in its common, accepted meaning. The court in its opinion referred to such commodities as "competing goods * * * of the same general class", and in applying the statute to the case at bar, as "other whiskies of like grade being sold in the Chicago market" (R. 53). The court pointed out that articles such as books would not fall within the term "commodities", saying (R. 49):

> "The defendant * * * invokes *Doubleday, Doran & Co.* v. *R. H. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409 * * *. The articles in question were books. The Doubleday books are not commodities within the accepted meaning of the term. Each book rests upon its own merit and outside of the binding and paper content it bears no similarity to the intent of the term used in the act, namely, commodities."

Section 2 of the Act provides:

> "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

Section 2, read in the light of Section 1, thus affords a remedy in a court of law against any person who willfully and knowingly advertises for sale, offers to sell or sells a commodity under the trade-mark, trade-name or brand of the producer or trade-mark owner, which commodity is in fair and open competition with commodities of the same general class produced by others, at a price below that stipulated in a resale price maintenance contract entered into pursuant to Section 1, whether or not the person so advertising, offering for sale or selling is, himself, a party to such a contract, provided such price-cutting has caused or threatens to cause damage. The remedy granted is given to the injured person.

The court below in construing Section 2 interpreted the action as limited in application to instances of price-cutting involving the use of a trade-mark, trade-name or brand and not to price-cutting in which the trade symbol was not used, as where the distinguishing mark is removed from the commodity. It is the use of the mark, name or brand, in a price-cutting transaction, which is made actionable as unfair competition, in the event damage flow from such use. The court below said (R. 54):

> "* * * the statute * * * deals * * * with the good will built up by a producer or distributor around a trade-mark, trade-name or brand, and provides that certain conduct with respect to the use of such trade-marks, names or brands constitutes unfair competition."

And (R. 55):

> "* * * a retailer * * * is not * * * prohibited from removing the trade symbol and selling * * * at whatever price he pleases."

The Fair Trade Act falls into the class of general statutes, that is statutes of broad language intended to act prospectively and be adapted to varying situations of similar character. Resale price maintenance systems necessarily will differ in accordance with the particular marketing method employed by the producer or his distributor. The very breadth of a general statute, however, may permit the conjuring up of situations which seemingly come within the literal meaning of its provision, and yet, if the statute be construed to apply to them, will result in an interpretation violative of constitutional principles. The validity of a general statute, therefore, depends upon its interpretation in a particular situation. As was said below (R. 49):

> "A general statute such as the Fair Trade Act may, of course, be invalid when applied to one set of facts and clearly valid when applied to other fact situations."

In the present case the marked commodity, which was in fair and open competition with other similar commodities, was sold in the Chicago market under a contract system. All retailers in the city who purchased the brand in the regular marketing channel entered into agreements with their respective wholesale distributors not to resell the commodity under its mark, name or brand at prices below those suggested by the producers (R. 40). The wholesalers, acting under the producer's trade policy of having the brand sold at a uniform retail price throughout the city, sold only to retailers who entered into such agreements and refused to sell to any who did not (R. 40). The court below held that under Section 2 of the act, a sale at retail of the brand under its mark and name by a retailer who, with knowledge of the contract system, somehow had acquired the commodity without first having agreed to maintain the uniform price, and which sale was wilfully and knowingly made at a

price below the uniform price stipulated in the contracts executed by the retailers, was actionable at the instance of a wholesaler whose interest in the good will built up around the trade-mark and trade-name, and his business dependent on such good will, were threatened with irreparable injury by the price-cut.

The construction of Section 2 which the court adopted in applying the statute to the facts at bar, interpreted the words "at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act"; as meaning "at less than the price stipulated in the price maintenance contract employed in a resale price maintenance system", that is, at less than the price established vertically by contract with all retailers purchasing the marked commodity in the regular marketing channel. The court below agreed with the Supreme Court of California that the decision in the case of *Doubleday, Doran & Co.* v. *R. H. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409, was distinguishable in that in the New York case the price sought to be maintained had been the subject of only one contract, that is, a contract between the producer and one retailer, and had not been the subject of a contract system in which all retailers in the regular marketing channel had agreed to maintain the price. The court below quoted with approval the California court, in part, as follows (R. 50):

> "Here there has been adopted a system of making written contracts, generally between producers and retail distributors, under which the products may and will be sold only to retailers who will resell at specified prices and have entered into contracts with the distributor to so sell such products. Practically all of the wholesale and retail [sellers] * * * have executed such contracts, and are observing them, and the plaintiffs' distributors have refused, and will refuse,

to sell such products to wholesalers or retailers who do not enter into such contracts. A contract has been tendered to defendant for execution, but defendant will not enter into the agreement. The plaintiffs therefor decline to sell the commodities to defendant unless the defendant enters into the contract. The defendant, with full knowledge of the system of contracts, and the extent of the execution and compliance with their terms by the trade, has obtained * * * [the marked commodity] 'unbeknown' to plaintiffs, and is selling them at prices less than the prices fixed by the contracts so extensively entered into by others. These facts serve to vitally differentiate the situation in New York from that here." (Words in brackets added)

Section 2, as above stated, provides that certain conduct with respect to the use of trade-marks, trade-names or brands constitutes unfair competition and is actionable by the injured party. The term "unfair competition" is a time-honored phrase for referring to the protection given by courts to the good will associated with trade-marks, trade-names and brands. In providing that certain use constitutes unfair competition, Section 2 intends to make available the manner of relief and redress afforded by courts in cases of unfair competition. Thus, the injured party may bring an action at law for damages or a suit in equity for an injunction. If the action is at law, he must show the sustention of legal damages; if in equity, a threatened and irreparable injury to his propery interest, etc. The defendant will have his day in court in each particular case and may show all of the defenses known to the law of unfair competition and trade-marks to defeat the plaintiff's contention that his property interest has been damaged or is being threatened with irreparable damage. If the defendant can show that selling at the cut-price

causes no damage, he may continue to cut. The common law as developed in courts of justice has its path open in specific cases to deal with the rights of the parties. In the instant case and in the case of *Seagram-Distillers Corporation, supra,* 363 Ill. 610, 2 N. E. (2d) 940, the suit was in equity and a permanent injunction was allowed. In the two cases entitled *Old Fort Dearborn Wine & Liquor Co.* v. *Old Dearborn Distributing Company,* decided by the Appellate Court of Illinois, First District*, it was held that the chancellor, in a suit brought under Section 2, might grant preliminary relief by way of an interlocutory injunction to restrain imminent and irreparable injury to the plaintiff's interest in the good will, pending a determination upon final hearing of the merits of the case.

The cause of action provided in Section 2 is afforded to "any person damaged". The decided cases in Illinois construing the statute establish that the action thus given may be availed of by any person in the regular distributive line who has a business dependent upon the good will associated with a trade-mark, trade-name or brand, which business has been damaged or will suffer damage in an injury to or destruction of the good will by price-cutting. In the instant case, the court sustained a suit brought by a wholesaler in the distributive line. In the *Old Fort Dearborn Wine & Liquor Co. case, supra,* Commerce Clearing House Federal Trade Regulation Service, Par. 25002, the Illinois Appellate Court made a similar holding and expressly pointed out that the Illinois statute was not to be construed as limiting the cause of action to a producer or manufacturer. In the *Seagram-Distillers case supra,* a wholesaler having an exclusive right to sell to wholesalers and retailers within the state was held entitled to institute suit under the statute.

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*See footnote page 7 *supra.*

The Fair Trade Act is remedial legislation. It provides no penal sanctions. As was said (R. 39):

"The act prescribes no criminal penalties".

Its operation is permissive and conditional. Unless the purchaser and distributors of a marked commodity, when confronted with the destruction of good will by price cutting, set up a vertical contract resale price maintenance system under the Act, no relief may be had. The remedy is one by way of self-help, to individual producers and their distributors, and is unconcerned with governmental regulation or policing. As was said below (p. 56):

> "• • • resale price maintenance laws such as the Fair Trade acts of California, New York and Illinois constitute permissive or conditional legislation. [The] • • • statute does not contain any mandatory requirements nor does it fix the prices which are to be imposed. No question of governmental price-fixing is, in consequence, involved. In other words, the law would remain wholly inefficacious unless the conditions which it prescribes are met. The plaintiff, for example, is not commanded to operate under it. Only in the event that manufacturers or distributors elect to avail themselves of its provisions does the statute come into actual operation." (Word in brackets added)

II.

Background of the Fair Trade Act.

The recent enactment of fair trade acts by the legislatures of fourteen states may best be considered in the light of a development which preceded it in the common law itself during the past fifty years. Some sixty cases, decided in this country in that time, mark the path taken

by producers and distributors of commodities sold under a trade-mark, name or brand, to achieve in courts of law upon common law principles protection against the destructive consequences of price-cutting. The trend of decision in the earlier part of the period, from 1880 to 1905, certainly must have convinced the lawyer practicing at the turn of the century that the common law soon would contain within it the rules which now have become embodied in the challenged statutes. It is altogether probable that had not the passage of anti-trust statutes intervened and such legislation been given the interpretation and application which it received, the decisional law today would afford the remedy which the fair trade acts have made available. The anti-trust enactments, however, exerted a retarding effect upon the growth which had taken place although they by no means ended the granting of relief by courts against price-cutting. The line of cases continued, and as it became apparent in time that preventing price-cutting of marked commodities was in furtherance of the very policy of the anti-trust laws and added to the public welfare, new principles were evolved and a remedy accorded. However, the law never quite afforded the complete protection which the fair trade acts allow.

Viewed in its common law background, the provision of the fair trade acts involves neither novel nor startling doctrine. It is difficult to believe, in the light of the decided cases, that the statutes transcend constitutional limitations. The principles involved rest upon common law rules of contracts and tortious interference with contractual relations, upon trade-marks and unfair competition, all as such rules had been developed and applied in the cases at common law dealing with price-cutting.

(a) The trade-mark and its function in the distributive system.

The trade-mark is a comparatively recently recognized legal device finding its origin in the rise of modern commerce. The industrial revolution marked the change from a household economy in which few chattels were produced for sale, or were sold at any distance from the producer, into an era of large productive enterprise and wide distribution. The distinguishing mark identifying the producer or seller is a concommitant of mass production. As late as 1742, chancery courts in England denied injunctive relief for infringement of a trade-mark. *Blanchard* v. *Hill,* 2 Atk. 484. Not until one hundred years later was the good will which a trade-mark owner had acquired, considered property and protected as such by injunction. *Perry* v. *Truefitt,* 6 Beav. 66 (1842).

In 1879, the Supreme Court of the United States referred to trade-marks as acknowledged property rights: The Court also stated that trade-marks found their root in the law of the various states, were dependent upon state law and statute for their security and protection, and were not the subject of congressional enactment except insofar as they may be used in interstate commerce. *Trade-Mark Cases,* 100 U. S. 82, 92, 93, 94.

The property right in a trade-mark which courts protect is an intangible and consists in the good will which the user of the mark achieves in dealing in an article distinctively labeled or marked, making it widely known, and marketing it in a manner which brings the favor of purchasers. Interference with such property is unfair competition. Mr. Justice Pitney in *Hanover Star Milling Co.* v. *Metcalf,* 240 U. S. 403, 412, 413, said:

"The redress that is accorded in trade-mark cases is based upon the party's right to be protected in the good will of a trade or business. • • • The common law of trade-marks is but a part of the broader law of unfair competition."

Modern commerce is characterized by its highly specialized division of labor. Wholesalers, jobbers and retailers all engage in marketing the marked commodity of the producer. In this commerce, the trade-mark is the link binding the producer, the distributor, jobber and retailer to the consumer, and to each other. Through its medium, the wholesaler is enabled to repurchase from the producer, the jobber from the wholesaler, and the retailer from the jobber or wholesaler. Consumers form their habit of repurchasing, and are able to repurchase, because of the symbol.*

Not only has the trade-mark implemented modern commerce but it has played an immeasurably large part in building up the businesses which exist and in making available to the great number of the people commodities of worth at low prices. The mark has also been instrumental in creating modern advertising.

The protection which courts at common law have granted to trade-marks, names and brands and which legislation in the several states has extended, proceeds upon the theory, *first*, that it is sound policy to permit producers and distributors to enjoy the profits which flow from a good reputation, *McLean* v. *Fleming*, 96 U. S. 245, 251, 252; *second*, that in such protection, producers and distributors will have an incentive to serve the public in a manner most

* Murchison, *Resale Price Maintenance* (1917), p. 80, Nystrom, *The Economics of Retailing* (1915), p. 268.

helpful to it; and *third*, that the public will gain in being able through the means afforded by the mark to identify the source of a commodity purchased, and to obtain, by the simple method of repurchasing, a commodity which has proved satisfactory, *Elgin National Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 674, 675, *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 531. The courts have felt that protected use of the identifying mark tended to assure the sustained production of high quality goods, for an unsatisfactory brand soon disappears from the market. Preservation of purity in marks was deemed necessary to assure the existence of a ready standard for the exercise of a judgment as to comparative values.*

(b) Price-cutting as an injury to the good will created by producer and distributor about a trade-mark, name or brand under which a commodity is sold.

In an early day, trade-marks, names and brands were threatened with destruction by a form of unfair trade practice commonly termed "palming off". The wrongful appropriation and debasement of the mark brought about by its unauthorized use by competitors, led to a remedy in the courts. Today, the law of unfair competition adequately protects the producer and distributor against the deceptive use of a mark by a rival trader, and the public is benefited in being secured against the palming off of spurious goods.

In more recent years, the mark has been threatened by a new form of unfair trade practice, which is as destruc-

* Economists recognize these beneficial attributes of trade-mark protection, Nystrom, *The Economics of Retailing* (1915), p. 268.

tive of the good will built up about the symbol as infringement had been. This practice in its various forms has been called "price-cutting of trade-marked commodities", "predatory price-cutting", "loss leader sales", "leader sales" and "bait sales".

A feature of modern marketing is its replacement of an individual or multiple price for a marked commodity by a uniform and standard price.* The assignment of a standard price to commodities by individual retailers, was the forerunner of the establishment by all retailers of a uniform retail price for marked commodities throughout the market. Producers, or at times wholesalers, of branded commodities commenced suggesting to all retailers a uni-

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*In the 19th century, Marshall Field, in Chicago, and A. T. Stewart, in New York, introduced the uniform price system in their respective retail stores. Seligman & Love, in their excellent work, *Price Cutting and Price Maintenance* (Harper & Bros. 1932) (pp. 4-5) say of these men:

> "They conceived the idea that it would be advantageous to introduce a system of fixed prices, from which a deviation would in no case be made. They estimated that it would save a great deal of time and that all the preliminaries connected with the price dickering would be eliminated. They believed, in the next place, that if the customer expected to find a definite price attached to each article he could center his attention upon the real elements in the transactions without the laborious necessity of experimenting in other places. In the third place, they felt that in this way the whole principle of *caveat emptor* would lose its efficacy and that the customer would learn to have confidence in the practices of the store in question.
>
> All these hopes were soon realized. The system of fixed prices proved to be attractive to the consumer and spread like wild fire."

form retail price for their brands. The apparent economic advantages which resulted from the establishment of a uniform retail price assured continuance of the practice as a form of modern business. The producer and his wholesale distributor found that a uniform retail price, because of the resultant fixed margin of return, brought retailer co-operation in pushing the line of goods; that the producer could conduct nation-wide advertising with greater success and profit because of his ability to name the price at which consumers could obtain the advertised commodity at retail stores; that greater consumer good will was obtained because the uniformity in price furnished the public with the means for determining the relative monetary worth of the brand; and that consumption of the goods increased because the purchaser who had found the commodity and price to his liking would re-purchase it without first determining if he could secure the brand elsewhere at lower prices and, meanwhile, falling into purchasing some other brand. Consumers also found that uniformity in the retail price of a marked commodity was to their benefit. They knew in making purchases that they were being charged the same price for a commodity that all others were paying, that they could replace a desirable brand for the same price previously paid for the original article, that they could satisfactorily compare the relative quality and prices of different competing brands, and that they were saved the trouble of spending time in bargaining with any given retail dealer, or in shopping about, in order to avoid paying an unnecessarily high price. On the whole, the adoption of uniform retail prices for marked commodities brought increased efficiency in production and distribution. Observance of price uniformity resulted in a new effectiveness to advertising, a new type of retailer co-operation and a public that was edu-

cated in the monetary worth of various brands. The use of the trade-mark, name or brand in the marketing of commodities, together with prevailing price uniformity, represents the essence of the present American business economy.*

The vast number of producers who sell commodities under a trade-mark, brand or name do not sell directly to the consumer but employ the usual marketing system, with final distribution being placed in the hands of numerous retail dealers. The retail price is generally announced by the producer. In determining the amount of the price, he takes into consideration such matters as the retail price of competing brands or commodities, the cost of production to himself as well as the cost of handling to each of the wholesalers and retailers, the general market conditions, advertising cost, etc.** So long as all the retailers sell the commodity at the suggested retail price the trade-marked, trade named or branded commodity competes fairly with the merchandise of others, and what good will of the public exists for the trade-mark, name or brand, is essentially the result of the relative quality and price of the commodity as compared with that of competing merchan-

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*Montague, *Business Competition and the Law* (1917), p. 216.

**See 13 Encyc. Soc. Sci. 326, 329 (1934) *Resale Price Maintenance* where it is said:

> "One may observe that the resale prices stipulated by manufacturers must be reasonably fair or the merchandise will not be purchased by consumers. The goods for which manufacturers typically desire to have resale prices maintained are in competition with other merchandise of the same sort and with various substitute articles. There is no serious danger that consumers will be exploited by any such scheme."

dise. If the commodity gains or enjoys widespread favor, as do the so-called "national brands", the producer and his wholesale distributors have no difficulty in securing retail outlets and in enlisting the services of the retail dealers to push sales, provided the retail price permits them to make a reasonable profit. The good will of the retailers which a branded commodity gains through public demand for the goods and the presence of a reasonable profit to the retailers, form an extremely valuable property interest which attaches itself to the mark, name or brand under which the commodity is sold.

"Price-cutting" of commodities sold under a trade-mark, name or brand is a practice which a few retail dealers have come to engage in and consists in the selling of a branded or otherwise identified commodity to the consumer at a price that is conspicuously lower than the generally prevailing price for the same branded commodity. It is a practice which has received widespread comment and been the subject of much discussion among business men, economists, lawyers, legislators and judges.* The facts in the case at bar present a typical instance of such price-cutting and its effects (R. 41-43). Albert Haring, in a book entitled *Retail Price-Cutting and its Control by Manufacturers,* published in 1935 by the Ronald Press Company, New York, describes price-cutting and its consequences, as follows (pages 7-8):

> "The manufacturer starts out with a product which is entirely unknown. The item is given a brand name,

*Moore, *Legal Protection of Goodwill* (1936) p. 118, Nims, *Unfair Competition* (3rd ed., 1929) sec. 299, pp. 300ff, Terry, *Price Standardization* (1915) p. 30, Rogers, *Predatory Price Cutting as Unfair Trade,* 27 Harv. Law Rev. 139 (1913). For the treatment of this problem in foreign countries see Seligman and Love, *Price Cutting and Price Maintenance* (1932), pp. 485-523.

and the name is registered as a trade-mark. The maker finds that this product is satisfactory because repeat orders come in. Satisfied customers can now obtain his product when they rebuy. A consistently increasing volume of sales tells the manufacturer that his identified product compares favorably with its competitors and offers a fair value to purchasers. Advertising is then started and the factory is expanded to take care of increased demand. The product, in turn, is improved and sales further enlarged. The plant and machinery have many years of life. There is every reason to believe that the demand for the well known identified product will continue indefinitely.

And then the outlook for a rosy future is suddenly upset because dealers begin to cut the retail prices of this product to profitless levels. At first, the lower prices at a few stores may even stimulate sales, but the inevitable result is that the cut-price stores begin to substitute less prominent competitive products when they can successfully do this. The non-cut-price stores find that price comparisons on the item favor their competitors, so they stop featuring the product or even discontinue stocking it. Dealers, instead of co-operating with the manufacturer to push the sale of his goods, actually reach the point of urging a customer to accept some other brand. Sales drop off, the plant no longer works at capacity and the manufacturer may soon be operating at a loss. * * *

Although the picture, as thus portrayed, is extreme, the question repeatedly emerges: 'should such damage to the good-will of the manufacturer be permitted?' "

(c) Price-cutting as an injury to the public.

Price-cutting of marked commodities affects adversely the public interest as well as the good-will of producers and distributors. The use of the "cut" as a bait to attract customers into the store where inferior goods are sold has heretofore been mentioned. *Seligman and Love* illustrate the practice with several instances.*

"Cutting" is also a device for pushing the sale of private brands, a practice regarded by economists as an undesirable development. C. T. Murchison, *Resale Price Maintenance*, p. 25 (1917).

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*Their work gives the following example (*ibid.* p. 426)

"An official of R. H. Macy & Co. testified that garments with the B. V. D. Label were sold at 44 cents although the suggested price was 50 cents. The store also sold its own brand at 44 cents. For the B. V. D. line it paid the jobber $4 a dozen; for its own line it paid the manufacturer direct only $3.60 a dozen. The quality was the same as that of the nationally advertised brand. It was argued that the Macy brand could be sold at a much lower price and still make as good a profit as B. V. D. item sold at 44 cents. Even at the same price, the store sold 1,000 dozen of its own brand to 50 dozen B. V. D. Replying to this testimony, the president of B. V. D. Company held this instance to be a perfect illustration of the use of standard goods as a 'leader' to draw customers who are switched to an alternative product. He argued that tests had proved the quality of the Macy line to be inferior to that of the B. V. D. line. The effect of this pricing policy, he said, was to give the small number who bought B. V. D. a bargain, but to overcharge the majority of customers who bought the Macy brand. In the end the manufacturer and competing dealers were injured without benefit to the consumers."

Price-cutting in its more harmful aspect tends to promote trusts and monopolies in the field of distribution. It leads to cut-throat competition which in turn destroys all competition. Seligman and Love, *ibid*, pp. 267-269.

Price-cutting likewise leads to the destruction of the brand by driving it out of the market or making it necessary to debase its quality. Either result is adverse to the public interest.

However, Seligman and Love find that the most important consideration in favor of price maintenance lies in identifying the interest of the consumer with the welfare of the producer. They say, (*ibid* pp. 258-259):

> "• • • modern economic life has brought to the front the interest of the producer. We know, indeed, that every human being is a consumer and that he cannot live unless he consumes. But we realize that he can consume only what has been produced and that, from the point of view of economic progress, the growth of consumption and the rise in the standard of life depend upon the increase of production. In a well-balanced community, under the regime of free competition, the point of paramount importance is the welfare of the producer. • • •
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> The application to the problem of price maintenance is clear. If price maintenance resolves itself into a conflict of interests between producers as a class and consumers as a class, modern economics teaches that, except in the clear proof of an existing danger of monopoly, the welfare of the consumers themselves will in the long run be best subserved by permitting efficient production and by refusing to interpose obstacles in the path of the producer. Modern economics, in other words, teaches us that we are first of all pro-

ducers, and only secondarily consumers; that progress in consumption depends upon advance in production; and that it is fallacious to subordinate the welfare of the producer to the alleged interests of the consumer. In the larger sense, the interests of the consumer are coterminous with those of the producer,"

(d) The common law recognized the evils sought to be remedied by the Fair Trade Act and developed the means employed in the statute for doing so.

THE PERIOD FROM 1880 TO 1905

The fair trade acts carry forward a common law development which extends back to the eighties. The principle embodied in the legislation, both as to purpose and means, may be found clearly stated and applied in the decided cases. For some time, producers or distributors of trade-marked commodities, in order to protect their distribution in the retail market against price-cutting, have sought a legal remedy. Some producers or distributors established contract resale price maintenance systems in which all retailers purchasing the goods in the regular marketing channel did so under an agreement not to sell below the uniform price. Other producers eliminated intermediate distributors and sold direct to persons in the retail trade under a form of agreement making such persons agents of the producer.

Apparently, the first case to be decided involving a vertical resale price maintenance system established by contract, is *Clark* v. *Frank*, 17 Mo. App. 602, decided in 1885. Its interest is chiefly historic. A retail dealer of Clark's "O. N. T." thread defended a suit brought by the manufacturer for the purchase price of a quantity of the thread

on the ground that the contract sued upon, in requiring the retailer to maintain a minimum retail price on the product, was void as being in restraint of trade, and, further, that the quantity sold had been purchased from a source other than the manufacturer. It was conceded that there had been price-cutting. The court construed the contract as requiring a maintenance of the price regardless of the source of purchase, and then said, with respect to whether the provision was void, pp. 604-605:

> "We see no force in the argument that the agreement not to sell the goods at less than the trade price was void as being in restraint of trade, so far as it related to goods which might be purchased of other dealers."

In 1889, the validity of a resale price maintenance contract system was before the Supreme Court of the United States. *Fowle* v. *Park,* 131 U. S. 88. The owner of a secret process for making a patent medicine, known as Balsam of Wild Cherry, sold the right of manufacture and sale in certain states to various purchasers and, as part of the consideration, obtained their agreement not to "sell, or cause any of said medicine to be sold, at less price than seven dollars for each and every dozen, except to such persons as shall become their agents for a whole state or territory, and in all cases where such agencies are granted they also promise and agree to take from such agents an agreement, w h a sufficient guaranty or penalty, that no sale of said medicine shall be made at a less price than that above named." The validity of the contract was sustained.

In one of the first cases brought under the Sherman Act, *In re Greene,* 52 Fed. 104 (C. C. S. D. Oh. W. D. 1892), the producer of certain whiskies agreed with its purchas-

ers to pay a rebate to those who maintained resale prices. After holding that the agreement for rebate was not to be interpreted as imposing a duty on purchasers to maintain prices, the court went on to say, p. 118:

> "But suppose the arrangement could by any possibility be construed into a contract between the parties from the date of the promise, or during the stipulated period, it could not be held to be a contract in restraint of trade. • • • Where the restraint is partial, either as to time or place, its validity is to be determined by its reasonableness and the existence of a consideration to support it. • • • In the present case, the arrangement treated as a contract was founded upon a valid consideration, and only secured to the vendors a reasonable protection in their business."

It is interesting to note that for twenty-three years after the decision in *In re Greene,* supra, no prosecution was instituted under the Sherman Act to challenge the legality of resale price maintenance contracts.

In 1898, the Illinois Appellate Court was asked to pass upon the validity of an agency contract prescribing sale prices. *Weiboldt* v. *Standard Fashion Co.,* 80 Ill. App. 67. The Weiboldt Store in Chicago and the Standard Fashion Company entered into an agreement, denominated an agency agreement, in which Weiboldt agreed to sell Standard patterns at the uniform price. In a suit brought against the store for breach of contract, it defended on the ground that the agreement was in restraint of trade and in violation of the Illinois anti-trust act. The Illinois court upheld the contract.

The Weiboldt case appears to be the first one in which the validity of an agency system for maintaining the uni-

form price was sustained at common law and under a state anti-trust law.

In 1899, the courts of New York were asked to determine the validity of resale price maintenance agreements. The first case before them involved the use of such an agreement in connection with the sale of a copyrighted book, *Murphy* v. *Christian Press Association Publishing Co.*, 38 App. Div. 426, 56 N. Y. S. 597. The suit there was for an injunction to restrain a sale of the book at "cut" prices. The defense raised was that the agreement to maintain the prices was void, in restraint of trade. The court in overruling the contention recognized the general rule that a resale price agreement, when entered into with respect to a commodity which is the subject of a monopoly, is invalid at common law as being in restraint of trade, but held that in the case of monopolies granted by law, such as copyrights and patents, the grant of the legal monopoly itself prevented the application of the common law rule against restraints. In effect, the court, in the case, extended the copyright laws by permitting the copyright owner, because of his monopoly, to enter into a resale price maintenance contract even though the subject thereof was a monopoly. A similar holding was made in *Standard American Publishing Co.* v. *Methodist Book Concern*, 33 App. Div. 409, 54 N. Y. S. 55. In a third case, *Walsh* v. *Dwight*, 40 App. Div. 513, 58 N. Y. S. 91, the question again presented itself, this time, however, with respect to a trade-marked commodity. The manufacturer of one brand of saleratus and soda complained that the manufacturer of "Dwight's Cow Brand Saleratus & Soda" was monopolizing the trade in the commodity by entering into contracts with dealers requiring them to maintain certain resale prices and to refrain from handling the saleratus and soda of competing brands. The New York court held that

the contracts were legal and not in violation of the state anti-trust law; that vertical price maintenance agreements were to be distinguished from horizontal combinations. The court said, 58 N. Y. S. 93, 94:

> "There is nothing in this contract that restrains or prevents competition in the supply or the price of any article or commodity. * * * This act [state anti-trust law] did not have the effect of preventing a manufacturer from fixing the price at which his articles should be sold. The act was evidently intended to prevent manufacturers or dealers in any article or commodity of common use from combining together to advance the price of such article or commodity, by which competition in the supply or price of the same would be restricted or regulated; but a contract by a single manufacturer as to the price at which his goods, when manufactured, should be sold by those selected by him for the purpose of sale or distribution, would not be a contract by which competition in the supply or price of the commodity would be restrained or prevented. All of the manufacturers could compete with these defendants in the sale of these goods."

The next cases arose in Massachusetts. The late Justice Holmes, as Chief Justice of the Supreme Judicial Court of Massachusetts, was one of the first to sustain the validity of resale price maintenance contracts. In 1900, in the case of *Garst* v. *Harris*, 177 Mass. 72, 58 N. E. 174, Mr. Justice Holmes permitted Garst, who had established a resale price maintenance system in connection with the retail sale of his patent medicine, which was sold under a trade-mark, to recover liquidated damages for breach of a price maintenance agreement. In 1901 and 1905, Garst was again before the Massachusetts court. *Garst* v. *Hall & Lyon Co.*,

179 Mass. 188, 61 N. E. 219; *Garst* v. *Charles*, 187 Mass. 144, 72 N. E. 839. In the *Hall & Lyon* case, Chief Justice Knowlton held that the plaintiff could not proceed against a price-cutting retailer who without any agreement had acquired the commodities not from Garst but from his vendee. The court said, 61 N. E. 220:

> "In the present case there was not only no contract between the plaintiff and the defendant, * * * but there is no averment or proof that the defendant fraudulently induced and procured the breach of a contract between the plaintiff and any of his vendees, to the detriment of the plaintiff."

In the *Charles* case, *supra*, Garst plead an interference with a contractual relation, and Chief Justice Knowlton there held that where the price-cutter had actually induced a breach, he was liable for damages and could be enjoined.

Thus, between 1885 and 1905, a body of law developed in the United States which gave the manufacturer of a distinguished commodity a legal means for securing protection against the price-cutter. Resale price maintenance contracts were upheld by all courts called upon to pass upon their validity and the agency system of price maintenance had likewise been recognized. The manufacturer, who wished, could set up a vertical resale price maintenance system for the distribution of his goods and then proceed in court against any one in the regular distributive line who broke his contract and cut, or against non-contracting parties who induced a breach for the purpose of cutting.

In England, the law followed the same path. *Elliman Sons & Co.* v. *Carrington & Sons*, L. R. (1901), 2 Ch. 275.

The Bement Case Through Boston Store vs. American Graphophone Company.

In 1902, the Supreme Court of the United States, in the case of *Bement* v. *National Harrow Co.*, 186 U. S. 70, decided that by virtue of the patent act, price maintenance provisions inserted by the plaintiff in agreements licensing various persons to make and sell farming implements under the plaintiff's patents, were valid both at common law and under the Sherman Act. Injunctive relief and damages were allowed. The opinion drew no distinction between a price maintenance provision contained in a license to manufacture coupled with a license to sell and one in a license merely to sell.*

In the decade and a half following the *Bement* decision, the common law remedy against price-cutting, as theretofore developed, exolved fully in a series of lower federal decisions centered about vertical resale price maintenance systems in their use to prevent price-cutting upon identified commodities produced under patents, copyrights and secret processes. In these decisions the lower Federal

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*The Court said (pp. 91, 93):

"Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee, for the right to manufacture or use or sell the article, will be upheld by the courts. * * * The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition."

courts, proceeding upon the assumption that, under the *Bement* decision, the patent and copyright laws (and on analogy the common law monopoly with respect to secret processes) prevented the application of the common law rule against resale price maintenance of commodities which were the subject of monopolies, fashioned out the principles of vertical resale price maintenance contract systems. While these cases erred in assuming that the patent and copyright statutes (and the common law relating to secret processes) had removed the common law ban upon resale price maintenance of commodities which were the subject of the created monopoly and permitted resale maintenance, the cases, nevertheless, show that where the prohibition has been removed and a statutory grant given, the principles of vertical price maintenance as there developed are to be recognized. The decisions held that the producer, or his distributor, of a commodity produced under a patent, copyright or secret process might establish a uniform price by contractual system in his line of distribution; that damages and injunctive relief could be had against those who "cut" in violation of their contractual undertaking and that similar relief would be given against noncontracting parties who "cut" with knowledge of the contractual system. With respect to non-contracting third parties, the view was taken that price-cutting by such individuals was an interference with the contractual relation and actionable, that the price established by the contract system was part of the granted monopoly and hence that price-cutting constituted an infringement.

A typical case of this period is one in which Mr. Justice Van Devanter, sitting as a member of the Eighth Circuit Court of Appeals, wrote the opinion. *National Phonograph Co.* v. *Schlegel*, 128 Fed. 733 (C. C. A. 8th Cir.). In that case it was held that an exclusive licensee might in equity

restrain his vendee from violating an agreement with the complainant which required the vendee to maintain the uniform price and not to sell to retail dealers who did not sign resale price maintenance contracts. The court regarded the contract as a form of restrictive license imposed on the sale of the patented commodity and indicated that, as such, it would be binding upon any one who purchased with notice of the contract.*

The Circuit Court of Appeals of the Seventh Circuit, in a decision likewise resting on the *Bement* case, *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. 424 (C. C. A. 7th Cir.), held that a patentee who sold all of its patented article under contracts to jobbers requiring them to observe a resale price restriction, could restrain by injunction a sub-vendee who purchased the article from one of the jobbers, and with full notice of the restriction, advertised and sold it at cut prices.

The other patent cases followed the same principle. In most instances resort to the court was had against a price-

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* The court said (p. 735):

"An unconditional or unrestricted sale by the patentee, or by a licensee authorized to make such sale, of an article embodying the patented invention or discovery, passes the article without the limits of the monopoly, and authorizes the buyer to use or sell it without restriction; but to the extent that the sale is subject to any restriction upon the use or future sale the article has not been released from the monopoly, but is within its limits, and, as against all who have notice of the restriction, is subject to the control of whoever retains the monopoly. This results from the fact that the monopoly is a substantial property right conferred by law as an inducement or stimulus to useful invention and discovery."

cutter who had not signed a resale price maintenance contract, but with knowledge of the contractual system had acquired the patented article outside of the regular channel of distribution. *Edison Phonograph Co.* v. *Kaufman,* 105 Fed. 960 (C. C., W. D. Pa.); *New Jersey Patent Co.* v. *Schaeffer,* 159 Fed. 171 (C. C., E. D. Pa.); *The Fair* v. *Dover Mfg. Co.,* 166 Fed. 117 (C. C. A. 7th Cir.); *Thomas A. Edison* v. *Ira M. Smith Mercantile Co.,* 188 Fed. 925 (C. C., W. D. Mich.).

The fact of knowledge in the price-cutter that the producer,* in protecting himself, had established a contract system for maintaining the retail price, afforded ground for the allowance of relief.

In *Edison Phonograph Co.* v. *Kaufman,* 105 Fed. 960 (C. C., W. D. Pa.), the court said pp. 961-2:

> "The defendants were advised fully of the reasons which had led to the adoption of the plan for doing business as contained in the 'jobbers' agreement,' and the defendants were distinctly informed that the complainants would not deviate therefrom in any instance. Shortly thereafter the defendants took steps to get a supply * * * ."

In *The Fair* v. *Dover Mfg. Co.,* 166 Fed. 117 (C. C. A. 7th Cir.) the court said, p. 118:

> "The record explicitly establishes that appellant, before it began to deal in this patented product, had full knowledge of the uniform prices that had been

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* Contract systems initiated by distributors were upheld and given similar protection: *Thomas A. Edison* v. *Ira M. Smith Mercantile Co.,* 188 Fed. 925 (C. C. W. D. Mich.), and *National Phonograph Co.* v. *Schlegel,* 128 Fed. 733 (C. C. A. 8th Cir.).

established by appellee and were being maintained by other dealers, and of the limited right of the party from whom it obtained sadirons."

On analogy to the patent cases, the lower federal courts enforced resale price maintenance systems, which had been set up to protect secret processed goods. Relief was granted against parties to the contract system and against third persons who obtained the goods either from someone a party to the system or through indirect means. *World's Dispensary Medical Assn.* v. *Platt*, 142 Fed. 606 (C. C. N.D. Ill. E.D.); *Dr. Miles Medical Co.* v. *Goldthwaite*, 133 Fed. 794 (C. C. D. Mass.); *Wells & Richardson* v. *Abraham*, 146 Fed. 190 (C. C. E. D. N. Y.), Aff'd 149 Fed. 408 (C. C. A. 2nd Cir.); *Dr. Miles Medical Co.* v. *Jayne's Drug Co.*, 149 Fed. 838 (C. C. D. Mass.).

The first of these cases to come before the United States Supreme Court were ones involving copyrights, *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339 and *Scribner* v. *Straus*, 210 U. S. 352. In each of these cases, Macy's purchased from wholesalers, copyrighted books published by the respective plaintiffs. Each book bore a notice stating the retail price and that a sale at a less price would be treated as an infringement of the copyright. The Court held that the only question before it was one of the construction of the pyright law and that the law did not grant copyright owners the right by mere notice to control the resale price.

In *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, the right to maintain resale prices on secret processed goods was denied by the Supreme Court of the United States. Mr. Justice Holmes wrote a dissenting opinion. At the time of that decision, Justice Lurton was a member of the Court, but because of his opinion in a case involving the same question, *John D. Park & Sons* v. *Hartman*, 153 Fed. 24 (C. C. A. 6th Cir.), did not participate

in the decision. The *Hartman* case was relied on in the *Dr. Miles* decision. Both cases were suits brought by the manufacturers of secret medicines sold under a system of resale price maintenance contracts, against John D. Park & Sons, who had not entered into any of the contracts, to enjoin the latter from obtaining the medicine by causing regular dealers to breach their contracts, and from selling the medicine at cut prices. In each case it was held that the contract system was an illegal restraint of trade at common law and void under the Sherman Act. It appears that the commodities in question were not in fair and open competition with other commodities of the same general class and that the resale price maintenance contracts stifled all possible competition in the commodity. That this fact was the basis of Justice Lurton's decision seems clear. Thus, he said, p. 42:

> "It is true that the complainant is not in combination with other makers of 'Peruna.' There are no others. If there were, there would not be a complete or general restraint; for it might then happen that these others, not being bound by any covenants, could supply the public. If the supply to come from them was adequate for the public demand, the public might be in no wise affected."

The opinion in the *Dr. Miles* case contains similar comment, 220 U. S. p. 403.*

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* "It is also urged that as the process is such, no one else can manufacture the article. But this argument rests on monopoly of production and not on the secrecy of the process or the particular fact that may confer that monopoly. It implies that, if for any reason monopoly of production exists, it carries with it the right to control the entire trade of the produced article and to prevent any competition that otherwise might arise between wholesale and retail

In *Bauer & Cie.* v. *O'Donnell,* 229 U..S. 1, the Court decided that a patentee could not by mere notice affixed to a patented article, and without entering into resale price maintenance contracts, establish the resale price. In *Boston Store* v. *American Graphophone Company,* 246 U. S. 8, it was held that the patent law did not authorize resale price maintenance contracts.

In deciding the foregoing cases, the Court pointed out that the Congress had power to confer authority to make resale contracts: *Bobbs-Merrill Co.* v. *Straus,* 210 U. S. 339, 350; *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373, 405; *Boston Store* v. *American Graphophone Company,* 246 U. S. 8, 26.

Vertical Resale Price Maintenance of Trade-marked Commodities at Common Law.

Patented, copyrighted, secret-processed and trade-marked commodities have been termed "specialties," that is, goods having some particular appeal to the public. As is well illustrated by the situations presented in the decided cases, such commodities are peculiarly susceptible to retail price-cutting. Their identification makes possible their "leader" use. However, while there is such common attribute among them, from another viewpoint they fall into two classes. Patented, copyrighted and secret proc-

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dealers. The principle would not be limited to secret processes, but would extend to goods manufactured by any one who secured control of the source of supply of a necessary raw material or ingredient. But, because there is monopoly of production, it certainly cannot be said that there is no public interest in maintaining freedom of trade with respect to future sales after the article has been placed on the market and the producer has parted with title."

essed goods, because of their origin in a monopoly to make and vend, generally are not confronted in the market with competing goods of the same general class. On the other hand, commodities sold under a trade-mark, name or brand generally do face such competition. The trade-mark involves no control of source or production but merely protects the good will which has become associated with the mark, against misappropriation by a stranger. No doubt, patented, copyrighted and secret processed goods may in some instances compete with goods of the same general class produced by others, and a trade-marked commodity may involve a monopoly, but as a general rule, the classes are separate. *Robert H. Ingersoll & Bro.* v. *Hahne & Co.*, 89 N. J. Eq. 332, 108 Atl. 128.

The leading state case sustaining the validity of a vertical resale price maintenance contract with respect to a trade-marked commodity is *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144. In that case the Washington Supreme Court held that a retailer who had violated his contract to maintain the resale price of "Fisher's Blend of Patent Flour" could be enjoined from cutting the uniform and standard retail price. The plaintiff was the manufacturer of a blended flour sold under a trade-mark. The flour enjoyed good-will among retailers and the public and was in competition with many other brands of flour. The court, in determining the validity of the contract, applied the test laid down by Mr. Justice Hughes in the *Dr. Miles Co.* case, 220 U. S. 373, 406, namely:

> "To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee * * *."

The court then found that the restraint was reasonable. The case presents an excellent discussion of the economic implications of the subject, the ruinous consequences which flow from price-cutting and the want of any public benefit. Among other things the court said, 137 Pac. 151:

> "Finally, it seems to us an economic fallacy to assume that the competition which, in the absence of monopoly, benefits the public, is competition between rival retailers. The true competition is between rival articles, a competition in excellence, which can never be maintained if, through the perfidy of the retailer who cuts prices for his own ulterior purposes, the manufacturer is forced to compete in prices with goods of his own production, while the retailer recoups his losses on the cut price by the sale of other articles at, or above, their reasonable price. It is a fallacy to assume that the price cutter pockets the loss. The public makes it up on other purchases. The manufacturer alone is injured, except as the public is also injured through the manufacturer's inability, in the face of cut prices, to maintain the excellence of his product."

The court distinguished the *Dr. Miles* case, 220 U. S. 373, in that the resale price maintenance contract there involved served no purpose other than to extend an absolute common law monopoly of production and vending.

The California courts at common law likewise sustained a vertical resale price maintenance contract when used in the distribution of trade-marked commodities which were in fair and open competition with other commodities of the same general class. In *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745, the California court said, p. 747:

"The contract here relied on does not relate to any olive oil except that manufactured by plaintiff. There is no suggestion that this comprises all, or any large proportion, of the olive oil manufactured or sold in the market supplied by plaintiff. • • •

Under these circumstances we see no reason why the contract alleged by plaintiff should not, as between the parties to it, be held to be valid. • • • By its terms the buyer is not precluded from engaging in any lawful trade. He may sell other olive oil at any price and on any conditions satisfactory to him. • • • There is nothing either unreasonable or unlawful in the effort by a manufacturer to maintain a standard price for his goods. It is simply a means of securing the legitimate benefits of the reputation which his product may have attained. Contracts • • • have generally been upheld where, as here, they had no tendency to create a monopoly."

In *D. Ghirardelli & Co.* v. *Hunsicker,* 164 Cal. 355, 128 Pac. 1041, the California court held that the producer of a brand of chocolate could restrain a retailer from cutting the price which the retailer had agreed with his wholesaler to maintain. All of the brand was sold by the producer to wholesalers under a contract requiring them to exact resale price maintenance contracts from all retailers. The court regarded the producer as a beneficiary of the contracts made between the wholesaler and retailers, 128 Pac. 1043. The *Dr. Miles Medical Co.* case, 220 U. S. 373, and the *Hartman* case, 153 Fed. 24 (C. C. A. 6th Cir.), were distinguished as involving monopolies, 128 Pac. 1043-1044.

In many other state cases, vertical resale price maintenance contracts have been held valid and not within the

prohibition of either the common law rule against restraints or the state anti-trust law. *John D. Park & Sons Co.* v. *National Wholesale Druggists Association,* 175 N. Y. 1, 67 N. E. 136; *Walsh* v. *Dwight,* 58 N. Y. S. 91, 40 App. Div. 513; *Marsich* v. *Eastman Kodak Company,* 279 N. Y. S. 140, 244 App. Div. 295, Affirmed 269 N. Y. 621, 200 N. E. 27; *Commonwealth* v. *Grinstead,* 111 Ky. 203, 63 S. W. 427; *Quinlivan* v. *Brown Oil Co.,* 96 Mont. 147, 29 Pac. (2d) 374; *State* v. *Scollard,* 126 Wash. 335, 218 Pac. 224; *Munter* v. *Eastman Kodak Company,* 28 Cal. App. 660, 153 Pac. 737; *W. T. Rawleigh Medical Co.* v. *Osborne,* 177 Ia. 208, 158 N. W. 566; *Clark* v. *Frank,* 17 Mo. App. 602; *Weiboldt* v. *Standard Fashion Co.,* 80 Ill. App. 67. *Contra: New Century Mfg. Co.* v. *Scheurer* (Tex.), 45 S. W. (2d) 560; *Mills* v. *General Ordnance Co.,* 113 Kas. 479, 215 Pac. 314.

The Illinois Supreme Court in the instant case similarly held that the state anti-trust law did not prohibit vertical resale price maintenance contracts as to marked commodities which competed with other goods of the same general class (R. 52-53, 55).

In *Ford Motor Co.* v. *Benjamin Boone, Inc.,* 244 Fed. 335 (C. C. A. 9th Cir.), the Ford Motor Company sought to enjoin a third person from obtaining cars from one of its dealers and selling them at cut prices to the public. There was some question in the case whether under the resale price maintenance contract used by the Ford Company with its dealers, the dealers were agents or individual retailers. The contract imposed upon the dealers all of the burdens of ownership and required them to pay the price of the car before delivery to him. The court held that the question was immaterial inasmuch as Ford cars were in competition with numerous other cars and maintaining a

resale price upon them did not injure the public. The court said, p. 341:

> "As already suggested, it would be entirely possible for the plaintiff to accomplish all the objects which it seeks under the present plan, by marketing its product through its own agencies, so constituted that there could be no doubt that its salesmen were its agents merely, and not vendees. But, were it otherwise, what benefit would result to the public by opening the door for the bushwhacking competition which, and which only, is likely to follow? It is to be borne in mind that the plaintiff has no monopoly of the automobile business, but only of one out of almost innumerable kinds of cars, all differing in detail one from the other, but of the same general type and all designed to be used in the same general manner, and for the same general purpose. * * * Obviously, therefore, the public already has competition to the fullest extent desirable, not a competition entailing the waste of duplication overlapping effort in marketing the product, with sporadic price-cutting of an irrational sort, but the competition of many products, each independently seeking public favor, against one of like character, but slightly different."

The English cases are in accord with the state cases, and protection is given to the fullest extent to resale price maintenance contracts on marked commodities which are in fair and open competition with other commodities of the same general class. Damages for their breach are allowed and preliminary and permanent injunctive relief granted. *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co.*, L. R. (1915) A. C. 79; *Palmolive Co.* v. *Freedman*, L. R. (1928) 1 Ch. 264.

The Agency and Refusal to Sell Price Maintenance Systems.

Resale price maintenance of commodities on interstate commerce did not end with the *Boston Store* case, 246 U. S. 8. In *United States* v. *General Electric Company*, 272 U. S. 476, the Court sustained the validity of the so-called agency resale price maintenance system. In that case the General Electric Company and its affiliates marketed Mazda lamps through 21,000 retail dealers located in various parts of the United States. Various forms of agreements were used which established an agency relationship between the company and the dealers and required them to sell at the prices prescribed by the principal. The court held that the system did not violate the Sherman act. A comparison of the agency and contract systems of price maintenance may be found in an article, Klaus, *Sale, Agency and Price Maintenance*, 28 Col. Law Rev. 312, 441. State courts have likewise approved the agency system and have issued injunctions against third parties who obtained the commodity from some agent and cut the price to restrain price-cutting. *Singer Sewing Machine Company* v. *Lang*, 186 Wis. 530, 203 N. W. 399. Also *Landauer* v. *Bard-Parker Company*, 210 N. Y. S. 635, 125 Misc. 461.

This Court has also approved resale price maintenance achieved through the so-called refusal to sell system. *United States* v. *Colgate & Co.*, 250 U. S. 300; *Frey & Sons, Inc.*, v. *Cudahy Packing Co.*, 256 U. S. 208; *Harriet Hubbard Ayer, Inc.* v. *Federal Trade Commission*, 15 F. (2d) 274 (C. C. A. 2nd Cir.) Cert. den. 273 U. S. 759. When the *Colgate* case was in the lower federal court, District Judge Waddell sustained the contention of counsel that the Colgate Company had an interest in its goodwill on

soaps which it could protect from price-cutting, saying 253 Fed. 522, 527 (D. C. E. Va.):

> "It cannot be said that the defendant has no interest in the prices at which its goods shall be sold. On the contrary, it had a vital interest, in so far as cutting the same would tend to demoralize the trade, and might have been more injuriously affected by the result of this disorganization than the public would be benefited by a temporary reduction in the prices of its products. The sale of the defendant's particular soaps cannot be said to be a necessity, or that the same bears a large proportion to the entire manufacture of soaps of the kind and grade involved. The successful prosecution of the defendant's business, and the continued use of its soap by the public, depend upon its ability to find and maintain a market for its output. Price cutting would almost inevitably result in reducing the defendant's business in a given community to only those engaged in that practice, and deprive it of the patronage of the great body of wholesalers and retailers engaged in what they believed to be a fair and legitimate conduct of their business. It by no means follows that, in the end, the public would be benefited, as the price cutter could easily raise prices after the demoralization caused by his conduct had been brought about, and profit individually by so doing. What the public is interested in is that only reasonable and fair prices shall be charged for what it buys, and it is not claimed that the defendant's manner of conducting its business has otherwise resulted."

In *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 224 Fed. 566, 573-574 (D. C. S. D. N. Y.) Aff'd 227 Fed. 446, (C. C. A. 2nd Cir.), Judge Howe of the District Court made a similar statement.

Observations on the Common Law of Price Maintenance.

Prior to the enactment of the fair trade acts, the common law had developed a well established body of law dealing with the protection of a trade-mark by vertical resale price maintenance. The following observations may be made with respect to this law:

1. While this Court has held as erroneous the earlier view of the lower federal courts that under the patent law, the copyright law and the law with respect to secret processed goods, a monopoly was conferred broad enough to sustain vertical resale price maintenance contracts against the charge of their being in restraint of trade, or illegal as tending to create a monopoly, the Court has never held that at common law a vertical resale price maintenance contract entered into with respect to a trade-marked, named or branded commodity which is in fair and open competition with commodities of the same general class produced by others, for the purpose of protecting the good-will, was illegal.

2. The state cases held that the owner of a trade-mark, or his distributor, had a sufficient property interest in the good will to warrant his protecting it by resale price maintenance contracts, and that such contracts were not an unreasonable restraint of trade if the commodity in question was in competition with other commodities of the same general class produced by others.

3. While it was held that persons having a monopoly in patented commodities, copyrighted articles, or secret-processed goods, could not, by virtue of their monopoly, and in the absence of statutory grant, maintain the resale price of their goods by contract, these holdings left un-

touched the principles involved by the lower federal courts, of contract law, and of interference with the contractual price involved in a resale price maintenance system, pages 40-46 *supra*. Such principles still may apply in any instance where the producer, or distributor, is engaged in marketing an identified commodity which is in fair and open competition with other commodities of the same general class and as to which the producer or distributor has a good-will interest which can be injured or destroyed by price-cutting. This particular aspect of the common law development may be summarized as follows:

The simplest contractual systems which were involved were those in which the producer sold direct to the retailer who marketed the goods to the ultimate consumer. In these instances, the contracts were simple contracts between the producer and each of his retailers, that the retailer would not sell the commodity below the price stipulated by the producer. More complicated contractual systems arose in instances where, between the retailer and the producer, there were wholesalers, jobbers, etc., in the distributive chain. In such cases, the character of the precise contract system employed depended on the nature of the particular business methods used in marketing. Generally, the contracts were entered into by the producer, or his distributor, with each of the wholesalers who agreed not to sell to any retailer without exacting from the retailer an agreement that he would observe the producer's, or distributor's, retail prices. The wholesalers then sold to all retailers in the regular channel on the price maintenance agreements stipulating the producer's or distributor's price.

(a) It was held under contract law that any party to the system could enforce the contract he had with any other party to the system when they were in direct con-

tractual relationship with each other, either by way of a suit for damages, *Garst* v. *Harris*, 177 Mass. 72, 58 N. E. 174; *Clark* v. *Frank*, 17 Mo. App. 602, or by enjoining the breach of the contract, *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144; *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745, 27 L. R. A. (N. S.) 395; *National Phonograph Co.* v. *Schlegel*, 128 Fed. 733 (C. C. A. 8th Cir.); *Palmolive Co.* v. *Freedman*, L. R. (1928) 1 Ch. 264; *Murphy* v. *Christian Press Association Publishing Co.*, 56 N. Y. S. 597, 38 App. Div. 426.

(b) On principles of third party beneficiary of a contract, any party to the system could enforce the contract of any other party to the system, to maintain the price, although the two parties were not in direct contractual relationship with each other, and, to this end, could obtain injunctive relief in a court of equity. *D. Ghirardelli & Co.* v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041; also *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co.*, L. R. (1915) A. C. 79, where an English court treated each party to the contractual system as an agent of the other parties to the contractual system for the purpose of entering into resale price maintenance contracts, the third party beneficiary not being allowed under the English law to enforce contracts made for his benefit.

(c) By an extension of the law of interference with contractual relationships, injunctive relief was granted in favor of a party to the contractual system, against a non-contracting retailer threatening to cut the price of the commodity, where the retailer obtained the goods with knowledge of the existence of the contractual system. In such cases, the courts held that if the commodity was marketed regularly under a system of vertical resale price maintenance contracts, a non-contracting retailer who

turned up with such goods for sale and sold them at a price cut, may be regarded as having induced a breach of contract. Cases granting injunctions against such non-contracting parties were: *Thomas A. Edison, Inc.* v. *Ira M. Smith Mercantile Co.*, 188 Fed. 925 (C. C., W. D. Mich. S. D.); *The Fair* v. *Dover Manufacturing Co.*, 166 Fed. 117 (C. C. A. 7th Cir.); *New Jersey Patent Co.* v. *Schaeffer*, 159 Fed. 171 (C. C., E. D. Pa.); *World's Dispensary Medical Ass'n* v. *Platt*, 142 Fed. 606 (C. C., N. D. Ill. E. D.); *Dr. Miles Medical Co.* v. *Goldthwaite*, 133 Fed. 794 (C. C. D. Mass.); *Wells & Richardson* v. *Abraham*, 146 Fed. 190 (C. C., E. D. N. Y.) Aff'd 149 Fed. 408 (C. C. A. 2nd Cir.); *Dr. Miles Medical Co.* v. *Jayne's Drug Co.*, 149 Fed. 838 (C. C. D. Mass.); *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. 424 (C. C. A. 7th. Cir.); *Edison Phonograph Co.* v. *Kaufman*, 105 Fed. 960 (C. C., W. D. Pa.); *Authors & Newspaper Ass'n* v. *O'Gorman Co.*, 147 Fed. 616 (C. C. D. R. I.). Similarly, damages have been granted against a retailer who, though not a party to any contract with the plaintiff, in order to obtain his goods, either caused a breach of contract by a party to the contractual system or his vendor caused such a breach, *Garst* v. *Charles*, 187 Mass. 144, 72 N. E. 839.

(d) When such contract systems were used by the owner of a patent or a copyright and the patent and copyright laws of the United States were construed as conferring the right to enter into such contracts under his monopoly, a breach of the contract by price-cutting, by either parties thereto or third persons who had knowledge of the agreements, was regarded as an infringement of the patent or the copyright. *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. 424; *National Phonograph Co.* v. *Schlegel*, 128 Fed. 733 (C. C. A. 8th Cir.); *Edison Phonograph Co.* v. *Kaufman*, 105 Fed. 960 (C. C., W. D. Pa.); *Thomas A. Edi-*

son, Inc. v. *Ira M. Smith Mercantile Co.*, 188 Fed. 925 (C. C., W. D. Mich.); *New Jersey Patent Co* v. *Schaeffer*, 159 Fed. 171 (C. C., E. D. Pa.); *The Fair* v. *Dover Mfg. Co.*, 166 Fed. 117.

III.

The Illinois Fair Trade Act does not violate the due process clause of the Fourteenth Amendment.

In view of the case background of the Illinois statute here challenged and the construction placed upon it by the state supreme court, the validity of the enactment under the Fourteenth Amendment is clear.

(a) The purposes of the statute are within the police power of the State.

As heretofore stated, at pages 8-12, *supra*, the purposes of the Illinois statute are to permit the owner of a good will based upon the use of a trade-mark, trade-name or brand to protect that good will, in the interest of the public, from destruction through price-cutting; to provide a means for eliminating the deception of the public through the use of loss-leaders; to safeguard the public from practices which may drive desirable brands from the market; and to eliminate certain tendencies towards trusts and monopolies in the field of distribution, fostered by the price-cutting of trade-marked goods.

The Supreme Court of California, in the case of *Max Factor & Co.* v. *Kunsman*, 5 Cal. (2d) 784, 55 Pac. (2d) 177, construed the California Fair Trade Act as having the same purposes and recognized them as properly within the police power. An analogous statute adopted in New Jersey in 1916, was interpreted by the New Jersey court as

having the same aims, and such statute was held a valid exercise of the police power. *Robert H. Ingersoll & Bro.* v. *Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030, 89 N. J. Eq. 332, 108 Atl. 128.* Likewise, a statute of somewhat different provision but having similar objectives was sustained. *Commonwealth* v. *Anselvich*, 186 Mass. 376, 71 N. E. 790, 791.

This Court has stated that the protection of trade-marks is a legitimate exercise of the state police power, *American Trading Co.* v. *Heacock Co.*, 285 U. S. 247, 258; *United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90, 99; *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 424 and see *Trade-mark Cases*, 100 U. S. 82, 94.

In *American Trading Co.* v. *Heacock Co.*, 285 U. S. 247, 258, it was said:

> "* * * the Federal statute did not attempt to create exclusive substantive rights in marks, or to afford

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*The New Jersey court said, 88 N. J. Eq. 222, 101 Atl. 1030, at p. 1032:

> "The statute is designed to promote good morals in business. It is an exercise of the police power of the state. That its purpose is within the legislative province, I think, admits of no question."

108 Atl. 128, at p. 129:

> "It is also well recognized that a person has a property interest in his trade-name and good will, and will, even in the absence of statute, be protected against injury to that trade-name and good will. This right has in this state been as above indicated recognized by statute. * * * The proofs before me demonstrate that, if defendant and others are permitted to pursue their practice of price cutting, the business of complainant will be ruined * * * or a method of distribution will have to be adopted which will greatly increase the price to the consumer, * * * that in either event com-

a refuge for piracy through registration under the Act, but to provide appropriate procedure and to give the described protection and remedies where property rights existed. The acquisition of such property rights in trade-marks rested upon the laws of the several States."

And in *United Drug Co.* v. *Rectanus,* 248 U. S. 90, 99:

"There was nothing to prevent the State of Kentucky (saving of course, what Congress might do within the range of its authority) from conferring affirmative rights upon Rectanus, exclusive in that commonwealth, as against others whose use of the trade-mark there began at a later time than his."

The trade-mark is a common subject of state legislation. Forty-five states have statutes extending their protection, Hopkins on Trade-marks, Trade Names and Unfair Com-

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petition will be effectively reduced. And to what useful purpose? So that retailers may make use of the trade-name and good will established after extensive advertising, to the extent that the public have associated with the article a standard of value, to fool the public into a belief that because a standard priced article can be sold at a cut price all other goods sold are similarly low priced; in other words, to defraud the public. It is no answer to say that full value is given by the retailer for each article sold. If such be the fact, a person is defrauded if he buys an article at full price for which he has no immediate need because he is induced to believe it a bargain and thereby deprive himself of the use of the purchase price for other purposes for which he might have used it if he did not think he was getting a bargain. * * * I think it is clear that a state may, in the exercise of its police power, prevent fraud upon its citizens by the use of the trade-name or good will of another. * * *"

petition, 4th Ed., 1924, p. 620; Shoemaker's Trade-marks, 1931, p. 1028. Many of these statutes, as does the Illinois trade-mark statute, Illinois Rev. Stats., Ill. State Bar Assn. Ed., 1935, Ch. 140, pars. 1 to 7, impose criminal sanctions upon the interference with the good-will of a trade-mark owner. The supreme courts of the several states have sustained many types of statutes aimed at protecting the good will of persons dealing in trade-marked goods. Thus, the New York Court of Appeals upheld a statute prohibiting the placing of any commodity, including the replacing of the original commodity, in a package which bore the trade-mark, name or brand of the owner and from which the original commodity had been removed, *People* v. *Luhrs*, 195 N. Y. 377, 89 N. E. 171. A New York statute allowing the owner of a trade-mark to secure, by the publication of a notice for three weeks in a newspaper, the right to exclude all persons from placing liquids in bottles which bore his mark, or to sell or purchase empty bottles bearing his mark, without his written consent, and making any interference with that right a misdemeanor, was held constitutional, *People* v. *Cannon*, 139 N. Y. 32, 34 N. E. 759.

The protection of the public against the various vices inherent in the use of leaders, such as the inveigling of purchasers into a store by the advertisement of an obvious bargain and there selling them other goods of an inferior quality at a sufficiently high price to offset any loss occurring in the handling of the cut-priced commodity, is recognized as a proper legislative purpose. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342; *Tanner* v. *Little*, 240 U. S. 369; *Pitney* v. *Washington*, 240 U. S. 387; *Sperry & Hutchinson Co.* v. *Weigle*, 166 Wis. 613; 166 N. W. 54; *Sperry & Hutchinson Co.* v. *State*, 188 Ind. 173, 122 N. E. 584; *State* v. *Seney Co.*, 134 Md. 437, 107 Atl. 189. These cases establish that a statute having as its purpose the discouragement

or abolition of methods of merchandising which involve the use of indirect price-cutting (such as the giving of trade inducements) lies within the police power.*

The power of a state to enact legislation for the purpose of preventing trusts and monopolies, is equally well established. *Central Lumber Co.* v. *South Dakota,* 226 U. S.

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*In *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 365, Mr. Justice McKenna said:

"But no refinement of reason is necessary to demonstrate the broad power of the legislature over the transactions of men. There are many lawful restrictions upon liberty of contract and business. It would be an endless task to cite cases in demonstration, and that the supplementing of the sale of one article by a token given and to be redeemed in some other article has accompaniments and effects beyond mere advertising the allegations of the bill and the argument of counsel establish. * * *

"'* * * complainants * * * rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a 'lottery,' may not be called 'gaming'; it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry, a matter of inquiry and of judgment that it is finally within the power of the legislature to make. Certainly in the first instance, and, as we have seen, its judgment is not impeached by urging against it a difference of opinion. *Chic., Burl. & Quincy R. R.* v. *McGuire* and *German Alliance Ins. Co.* v. *Kansas, supra.* And it is not required that we should be sure as to the precise reasons for such judgment or that we should certainly know them or be convinced of the wisdom of the legislation."

157; *Smiley* v. *Kansas*, 196 U. S. 447; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 129; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 107. In *Waters-Pierce Oil Co.* v. *Texas*, the Court said, p. 107:

> "That state legislatures have the right to deal with the subject-matter and to prevent unlawful combinations to prevent competition and in restraint of trade; and to prohibit and punish monopolies, is not open to question. *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115; *Smiley* v. *Kansas*, 196 U. S. 447."

It is important to observe that the specific purposes of protecting trade-mark owners against the injurious consequences of price-cutting by the persons distributing their marked or branded goods, the protection of consumers against loss-leader practices, and the discouragement of trusts and monopolies which result from cut-throat competition such as price-cutting encourages, have been recognized by courts at common law as of sufficient public interest to justify a relaxation of common law rule against restraints on trade. Thus, as heretofore shown, contracts having as their purpose the restriction of competition between the vendees and sub-vendees of branded or marked goods are held valid at common law where the goods are in fair and open competition with commodities of the same general class. *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 469, 137 Pac. 144; *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745; *D. Ghirardelli & Co.* v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041; *Elliman Sons & Co.* v. *Carrington & Sons*, L. R. (1901) 2 Ch. Div. 275; *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co.*, L. R. (1915) App. Cas. 79; *Palmolive Co.* v. *Freedman*, L. R. (1928) 1 Ch. 264.

In several of the federal cases holding lawful a refusal to sell the price-cutter, the courts have taken pains to express the view that the purposes to be accomplished by preventing the price-cutting of a trade-marked article would justify positive legal protection of vertical resale price maintenance on trade-marked commodities which are in fair and open competition with other commodities in the same general class. Thus, the statement of Judge Howe in *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 224 Fed. 566, 573-574 (D. C. S. D. N. Y.), Aff'd. 227 Fed. 46 (C. C. A. 2nd Cir.).

In view of the recognition by so many courts of the legitimate public end to be served by furthering the purposes of the Illinois Fair Trade Act, it would seem beyond question that the legislature was acting within its power in recognizing the evils of price-cutting of commodities sold under a trade-mark, name or brand, and seeking by statute to remedy them.

(b) The means provided in the act are reasonably related to the purposes sought to be effectuated.

The means provided by the Illinois Fair Trade Act for effectuating its purposes may best be understood in the light of decisions dealing with the protection given the trade-mark at common law against price-cutting, pp. 46-51, *supra*, and those which evolved the principles of vertical resale price maintenance in the field of patent, copyright and secret processed goods, pp. 40-46, *supra*.

The cases involving trade-marks established the view that a trade-mark owner, or a distributor, whose goods were in fair and open competition with other goods of the same general class, had a good will built up around a

trade-mark, brand or name which could be injured or destroyed through price-cutting competition among his own retailers and that the public policy which originally dictated the protection of the good will in a trade-mark against the use of the mark on spurious goods, also required the protection of the good will against the use of the mark in cut-price transactions.

This view was a recognition of a broader property interest in the trade-mark owner or his distributor than was accorded by the earlier cases which merely protected the trade-mark owner against "palming off," pp. 46-51, *supra*. This property interest, however, while recognized, was limited in that it merely permitted the owner of the trade-mark good will to protect that good will from price-cutting by voluntary agreement. The injury from price cutting was without a remedy unless the owner or distributor had secured the personal obligation of the price-cutter not to sell the commodity under the mark at the cut-price. Price-cutting of a brand was not *per se* a trespass to the good-will. Nevertheless, the sustaining of such contracts as being in the public interest, permitted recourse, where available, to the contract law of inducing a breach of a contractual relationship, and third party beneficiary doctrine. No case, however, dealing with trade-marked commodities, extended the law so that a person became subject to an action by merely selling the trade-marked goods which he purchased with knowledge of the contracts below the price stipulated in the contracts.

It has heretofore been pointed out that in the field of patent, copyright and secret processed goods, the lower Federal courts, proceeding upon an interpretation of the patent law, the copyright law and by analogy the common law monopoly granted to secret processed goods, gave the

patentee, copyright owner, secret process owner and their licensees, the right by contract to enlarge their monopolies so as to include the imposition by control of restrictions on the resale price at which their vendees and sub-vendees could sell the goods. While these cases did not regard the patent, copyright or secret process monopoly as *ipso facto* conferring upon the patentee, copyright owner and secret process owner the right by mere announcement to establish the resale price of his goods but required that he institute voluntary agreements with his vendees for the vertical maintenance of the resale price, the cases did extend the normal contract principles of third party beneficiary or inducing breach of contract. When a patent owner, copyright owner or secret process owner had once initiated a vertical resale price maintenance system, the right to enforce the price named in his system was treated by the courts as becoming part of his monopoly and a wilful violation thereof by any one with knowledge cutting the price, was punished as an infringement of the patent, copyright or secret process.

The cases under the patent, copyright and secret process law never made it entirely clear whether the remedy given was really based upon the theory of infringement or was merely on an extension or modification of contract principles in regard to inducing breach of contracts and third party beneficiary and making such contract law applicable to the peculiar requirements of vertical resale price maintenance in those cases. It may be said, however, that by a combination of patent, copyright and secret process law together with contract, third party beneficiary and inducing breach of contract law, certain unique principles of law there evolved peculiarly applicable to vertical resale price maintenance. These cases established that a suit might be maintained against a person who had not induced a

breach of contract, in the sense in which that term is generally used in the cases, but had merely purchased goods which he knew were the subject of a vertical resale price maintenance contractual system and resold at less than the stipulated price.

Trade-marks bear some similarity to patents, copyrights and secret processes. One of the purposes at common law for protecting trade-marks, namely, the incentive thereby given producers to serve the public efficiently by producing goods of quality, is a purpose of the patent, copyright and secret process laws. Trade-marks, however, differ from patents, copyrights and secret processes in that they do not, by their nature, involve a monopoly of the making or vending of any commodity. They may be used on commodities which may, or may not, be the subject of a monopoly. While the patent, copyright and secret process law protects monopolies in regard to commodities themselves, the trade-mark law protects merely a monopoly in the use of a mark, not a monopoly having any reference to commodities themselves. From these principles it follows that vertical resale price maintenance, when applied to the purpose of protecting the good will in a trade-mark, brand or name, means the maintaining of the resale price in any instance where the trade-mark, name or brand is used in making the resale, but does not mean maintaining the resale price of the commodity itself, if it is feasible to remove the mark and sell the commodities as unmarked or unbranded goods.

Producers and distributors of trade-marked commodities, in using vertical resale price maintenance systems with respect to trade-marks, found, as already stated, that ordinary contract principles did not extend sufficiently to cover the various peculiarities of the vertical price maintenance

system. The ordinary distributive system functions with a highly specialized division of labor, with numerous sales between many people taking place between the producer and the ultimate consumer. Unless the producer or his distributor could enforce contracts against persons several steps removed in the distributive chain and against persons who, somehow, managed to obtain the goods without entering into such contracts, vertical resale price maintenance could not be achieved.

To one considering the problem it is apparent that rules analogous to those established by the lower federal courts in the patent, copyright and secret process cases, could be applied very simply in the field of trade-mark law and accord the necessary protection. Instead of calling the injury inflicted by a person in breaking such a contract, or the injury inflicted by a person who did not himself enter into a contract but obtained and sold the goods under the trade-mark, brand or name at a cut price with knowledge of the contractual system an infringement it could be regarded as a trespass on the trade-mark and treated as unfair competition. This is just what the Illinois Fair Trade Act and the other fair trade acts have done. The opinion of the Supreme Court of Illinois shows that this was its interpretation of the Illinois Fair Trade Act. The means provided by the act as so construed, involve three separate concepts: first, the concept of restricting the use of a mark; second, the concept of accomplishing this restriction through establishing contractual systems; and, third, the concept of an unauthorized use of the mark after its restriction had been so accomplished as unfair competition, pp. 12-21, *supra*.

Since these means were applied in common law cases to achieve the very purposes of the Act, there is a well estab-

lished body of case law sustaining the means as appropriate to the end.

In *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144, the Washington Supreme Court, in referring to a resale price maintenance contract as a proper means of protecting the producer's good will, said, p. 151:

> "It will not do to say that the manufacturer has no interest to protect by contract in the goods after he has sold them."

Similarly, in *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745, it was said, p. 747:

> "There is nothing either unreasonable or unlawful in the effort by a manufacturer to maintain a standard price for his goods. It is simply a means of securing the legitimate benefits of the reputation which his product may have attained. Contracts similar to the one under discussion have been considered in a number of cases, and have generally been upheld where, as here, they had no tendency to create a monopoly."

In *Robert H. Ingersoll & Bro.* v. *H. Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030, 89 N. J. Eq. 332, 108 Atl. 128, the court, in speaking of a statutory notice system for maintaining resale prices said, 108 Atl. 130:

> "Complainant does not seek to retain any right in the article itself; it merely seeks to restrain the use of its trade-name and good will, except under conditions fixed by it. It may permit the purchaser of the article to use its trade-name and good will under such conditions as it sees fit."

Other common law cases have emphasized the appropriateness of resale price maintenance contract systems to

protect the good-will of the producer or his distributor in his trade-mark, from the particular point of view that price-cutting will cause such a lowering of prices that retailers will refuse to handle the goods, and the loss of such retailer good-will results in a loss of consumer good-will. A contract with the retailers in which they voluntarily agree to maintain prices, is a most pointed method for insuring the retention of retailer, and, consequently, all good-will. *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co.* (1915) 1 Ch. 79, 90-92; *Thomas A. Edison* v. *Ira M. Smith Mercantile Co.*, 188 Fed. 925, 927 (C. C. W. D. Mich.). Also *United States* v. *Colgate & Co.*, 253 Fed. 522, 527, Aff'd. 250 U. S. 300.

The maintenance of a resale price by contract on trade-marked goods, when sold under the mark, has also been recognized as a proper means for the protection of the public against such consequences of price-cutting, such as the inveigling of consumers into buying cheaper goods, the debasing of the quality of the commodity, and the reduction of the number of retail outlets willing to serve the consumer. In *Robert H. Ingersoll & Bro.* v. *H. Hahne & Co.*, 89 N. J. Eq. 332, 108 Atl. 128, 130, it was said:

> "* * * to permit defendant to avoid the effect of the notice would be to permit an act which would tend * * * to defraud the public."

On the general proposition that the discouragement or abolition of price-cutting is a proper means to protect the public from the injuries resulting when consumers are continually being induced to make bad bargains: *Rast* v. *Van Deman*, 240 U. S. 342, 365.

In reference to the use of maintained prices on trade-marked goods to prevent a lowering of quality of goods

sold the public: *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144, 151. Also, page 33, *supra*.

As to the effectiveness of vertical resale price maintenance contracts on trade-marked goods in fair and open competition with other goods of the same general class, as a means to prevent certain undesirable forms of competition which lead to higher prices and tend toward monopolistic control: *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144, 148, 151:

> "Fairly considered, the contract, while slightly restricting competition, is primarily intended to promote competition by enabling the appellant to compete with other high grade flours while maintaining the excellence of its products. * * * Fixing the price on all brands of high grade flour is a very different thing from fixing the price on one brand of high grade flour. The one means destruction of all competition and of all incentive to increased excellence. The other means heightened competition and intensified incentive to increased excellence."

And, in *Ford Motor Co.* v. *Boone*, 244 Fed. (C. C. A. 5th Cir.) at page 341:

> "Does any one suppose that such dealers would for any considerable length of time cut the price? In the light of experience is it not so probable as virtually to amount to a certainty that the prices would soon reach a common level, and that level would be higher than the present one? Upon the other hand, will the public not have the benefit of the freest and most effective competition if each patentee manufacturer of automobiles is permitted to market his product in his own way? May it not be assumed that, impelled by considerations of self-interest, he will select the most

economical method, and that the keen and vigorous competition of innumerable other manufacturers will force him to give to the public the major benefit arising from his economies?"

Also, *Robert H. Ingersoll & Bro.* v. *Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030, 1032; 89 N. J. Eq. 332, 108 Atl. 128, 130.

This Court has held that the elimination of price-cutting might be viewed as a proper means for prohibiting monopolies, *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157.

If it be accepted that a contract system is a proper means of achieving vertical resale price maintenance, then making the breach of such contracts by parties thereto or by acts of third persons who knowingly sell goods at less than the price fixed in such contracts actionable as unfair competition, is also a means reasonably adapted to the ends of the statute. It has been held by this Court that where certain contracts are of public interest, it is within the power of the legislature, as a means of protecting those contracts, to make conduct of a person in buying goods to which the contract relates and selling them in disregard of the contract even though he is not a party to the contract and does not induce a breach in any other sense than that he buys and sells goods which he knows to be subject to the contractual arrangements, actionable. *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-operative Marketing Assn.*, 276 U. S. 71. If the purposes which the State of Illinois intended to further by recognizing vertical resale price maintenance contracts on the trade-marked goods within the Act, were within province of the legislature, it had the power to make effective the Act by providing a means of extending its operation to non-contracting persons outside of the regular distributive channel.

The objection that the statute does not provide a means of eliminating all of the abuses of the character which the legislature sought to remedy, does not go to the constitutionality of the Act. *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157. Nor is the objection that the means provided by the statute may prevent the appellant or other persons engaging in harmless or even beneficial conduct on some occasions, a constitutional one, *Booth* v. *Illinois*, 184 U. S. 425, 429; *Otis* v. *Parker*, 187 U. S. 606, 609.

Some of the briefs in this Court, attacking the constitutionality of the fair trade acts, assert that they will operate to create monopolies, to regiment industry, and to fix the price of all commodities. The Act, it is to be noticed, as interpreted by the Illinois Supreme Court cannot possibly have any such consequence. No producer or distributor can make any use of its provisions unless the goods he sells are subject to the competition of like goods in the market. If the producer or distributor does fall within that class, he still will be unable to avail himself of the Act unless the wholesalers and retailers through whom he distributes agree voluntarily by contract not to resell under the trade-mark, brand or name of the producer or his distributor at less than the stipulated price. The establishment of such a contractual system would be impossible in many lines of goods because by their nature they require quick turn-overs, even at cut-prices, or are subject to peculiar market conditions which make it desirable for the prices to vary between different outlets. And even in those instances where the goods are adapted to vertical resale price maintenance contracts for the purpose of preserving the good will in the mark from injury at the hands of price-cutters, a contractual system will not be set up unless market conditions are subjecting the good will in question to injury from extreme cut-throat price-cutting. The adop-

tion of such a system will not mean that retailers generally will be prohibited from varying somewhat from the stipulated price. A producer or distributor is not going to incur the expense of a court action unless the price-cutting indulged in is extreme and threatens the good will with serious injury or destruction. And then even in a court proceeding, under the decision of the Illinois Supreme Court, the only relief which can be granted is the enjoining of the future use of the trade-mark, name or brand in cut-price sales or the granting of damages for injury which can by ordinary rules of evidence be established to have resulted to the plaintiff from the wilful and knowing acts of the price-cutter.

The Act, no matter how undesirable it can be viewed, cannot possibly have any of the myriad disastrous effects to society which opponents of the Act contemplate.

(c) The Fair Trade Act as construed by the Illinois Supreme Court is not so indefinite in its terms as to violate the due process clause of the Federal Constitution.

Whether the terms of any given statute are so indefinite as to render the act in question unconstitutional depends entirely on the nature and purpose of the statute and the degree to which previous case law and business experience provide a criteria by which to interpret the terms of the statute. The Fair Trade Act prescribes that defendants are only subject to action in instances where they have acted wilfully and knowingly to the damage of the plaintiffs in doing certain specific acts, namely, making a sale of a commodity under a trade-mark, brand or name, at less than the resale price stipulated in contracts between the producer or distributor of trade-marked goods and their vendees. The action provided is either in equity for in-

junctive relief, or at law for the recovery only of compensatory damages, as for unfair competition. In a statute operating in only these ways, its terms need not be as definite as in a statute providing criminal sanctions, imposing penalties or unsettling status rights or titles, *Miller* v. *Schoene*, 276 U. S. 272, 281. Also, Freund, *Legislative Regulation* (1932), pp. 231-254.

From the point of view of the producer or distributor, if the Act permits the fixing of a price on commodities in any instance rather than the mere restriction of the use of a mark, brand or name, and any change in the previous law is thereby made, the statute operates by way of relaxation of the state anti-trust law. Thus, in any instance in which the protection of a good will built up around a trade-mark, brand or name, can only be achieved by restricting the resale of the commodity, as where the mark cannot be conveniently removed from the commodity in question, a producer or his distributor must judge at his peril whether his commodity comes within the class defined in the Fair Trade Act. If his commodity is not one of standard quality bearing a trade-mark, brand or name sold in fair and open competition with other commodities of the same general class, and the contracts he enters into tend to give him a monopolistic control of the price on the commodity itself, the producer or distributor runs the chance of criminal prosecution under the Illinois Anti-Trust Law. The indefiniteness of terms in this respect, if any, cannot be complained of by the defendant. Nor can such indefiniteness in this respect injure the public, because by the very reason of the indefiniteness, the possibility of prosecution under the Illinois Anti-Trust Law, will deter use of the Act, in any case where it is not clear that vertical resale price maintenance establishes a price which is ultimately the result of the competition between the various brands in the market.

From the point of view of the price-cutter, the statute, by requiring proof that he wilfully and knowingly sold a commodity bearing a trade-mark, brand or name at less than the resale price stipulated in the contracts entered into by the producer or distributor with his vendees, safeguards price-cutters from liability in any instances in which they do not commit an intentional wrong. The possibility that the price-cutter may be unable to determine definitely whether the contracts, maintaining the resale price of which he has knowledge, operate as to a commodity which is in fair and open competition with other commodities of the same general class, is the same difficulty encountered by any person who interferes with a contract which by its nature may or may not create an illegal restraint in trade, dependent upon the actual facts as to the competitive market. Neither the common law concept of a restraint of trade, nor the federal or state anti-trust legislation, provide any criteria for determining what is illegally monopolistic and what is fairly competitive, except the intrinsic idea of a monopoly itself.

All cases at common law permitting vertical resale price maintenance contracts as to trade-marked commodities prescribed the limitation that such contracts were only valid where the commodity bearing the mark, name or brand was itself in fair and open competition with like commodities. These cases developed a sufficiently definite application of the words "fair and open competition" so that the Illinois Fair Trade Act may be read in their light. These cases hold that in order to be the subject of vertical resale price maintenance contracts adopted to protect the good will in a trade-mark, brand or name, the commodity must be subject to the competition of other commodities which would serve the public as adequately as the commodity in question. Thus, flour must be in competition with

other flour of the same quality, an automobile must be in competition with other automobiles, olive oil must be in competition with other olive oils, ground chocolate must be in competition with other ground chocolate, tires must be in competition with other tires, and soap with other soaps.

The case of *Fisher Flouring Mills* v. *Swanson*, 76 Wash. 649, 137 Pac. 144, discussed at great length the criteria which were to be used in determining whether a commodity was in fair and open competition with other commodities of the same general class, for the purpose of a vertical resale price maintenance contract. It was there pointed out that each case must be determined upon its own facts, and the test of validity was whether the contracts gave the producer or distributor either practical control of a market or any approximation to monopoly, the test being the same as that applied in all cases under the common law rule of illegal restraints on trade. The basis for drawing the line at this point was stated by the Washington court, 137 Pac. 148:

> "In the absence of a monopoly, either actual or potential, as above defined, a contract fixing retail prices to the consumer cannot have an effect appreciably inimical to the public interest because it cannot fix prices at an unreasonably high figure without defeating its own purpose by either signally failing to maintain the fixed price, or putting the individual manufacturer out of business. In either case, it fails to restrict competition. Either the consumers will not buy the product at the price fixed, or, if they do, the high price will stimulate competition in production and the price will inevitably fall. The given manufacturer will thus be compelled to accept one or the other alternative. He must either fix the price to cover only a

> reasonable profit, or he must retire from business, and this for the simple reason that, in the absence of a monopoly either actual or potential, of the entire supply, the natural conditions of trade will defeat any attempted restriction of competition."

In that case the contracts resulted in the maintenance of the price on only one brand of high grade of flour which competed in the market with many brands of high grade flour, and the contracts were upheld.

The Washington court considered an objection which has been raised by opponents of the Act, namely, that without horizontal combination all producers might institute identical vertical resale price maintenance contracts and thus bring about the same results which arise through horizontal combination.* Answering this the court said (137 Pac. 148):

> "It may be objected that, since protection against general restriction is the basis of the rule of public policy, then if a general restriction is brought about by all, or nearly all, of the dealers in a given commodity in a given area making contracts of the same character with all retailers, the public interest is injuriously affected just as if there were an actual combination or contract creating or approximating a monopoly. The possibility of such a result as a mere coincidence, however, is too remote to furnish a reason for declaring the contracts of a single manufacturer who has no monopoly or approximation thereto void. * * * No such condition, however, is presented by the record before us."

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*Economists regard this objection as unrealistic, Seligman and Love, *ibid.*, pp. 233, 260.

The courts in specific cases have taken judicial notice of whether or not a commodity was in fair and open competition with other commodities for the purpose of permitting vertical resale price maintenance in the protection of the good will of the trade-mark owner or distributor. In *Grogan* v. *Chaffee,* 156 Cal. 611, 105 Pac. 745, the court said (105 Pac. 747):

> "The contract here relied on does not relate to any olive oil except that manufactured by plaintiff. There is no suggestion that this comprises all, or any large proportion, of the olive oil manufactured or sold in the market supplied by plaintiff. While plaintiff alleges that he manufactures oil by a process of his own discovery, there is nothing exclusive in the product resulting from this process. All that he claims for his oil is that it is pure and wholesome. The court must assume, as a matter of common knowledge, that others may and do manufacture pure olive oil in considerable quantities."

In *D. Ghirardelli & Co.* v. *Hunsicker,* 164 Cal. 355, 128 Pac. 1041, the court quoted the above language from the *Grogan* case, and said (128 Pac. 1044):

> "The same is substantially true of plaintiff's ground chocolate. That it comes anywhere near controlling the market in ground chocolate is not suggested, and as a matter of common knowledge we do know that others may and do manufacture and sell such chocolate in considerable quantities."

Also *Cole Motor Co.* v. *Hurst,* 228 Fed. 280, 284 (C. C. A. 5th Cir.):

> "There are a multitude of other companies from whom purchasers can readily obtain motor cars, vary-

ing in little, if anything, from the perfectibility of the car made by the plaintiff company. * * *

Was it not, then, easily possible that * * * any one might have purchased a Ford, a Cadillac, a Pierce-Arrow, a Packard, a Chalmers, a Hudson, or any other of the multitudinous machines which are being constantly manufactured and offered for sale at widely varying prices?''

On this point, also, *Ford Motor Car Co.* v. *Benjamin Boone, Inc.*, 244 Fed. 335, 341 (C. C. A. 9th Cir.).

The English courts applied the same rule: *Palmolive Co.* v. *Freedman*, L. R. (1928) 1 Ch. 264, 277, 281; *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co.*, L. R. (1915) A. C. 79, 90.

The suggestion by appellant in the instant case (Appellant's Brief pp. 17-20) that in determining what are commodities of the same general class, resort must be had to the Illinois Trade-Mark Act, ignores entirely the purpose of the provision that the vertical resale price maintenance contracts allowed for the protection of the good will in a mark, brand or name, apply only to goods which are in fair and open competition with other goods of the same general class. The forty-nine classes defined in the Trade-Mark Act were groupings made entirely for convenience in administering the registration of trade-marks. The groupings were not concerned with the prevention of monopolies but only with the prevention of the use of a trade-mark of a producer on goods so related in nature to goods produced by some other producer who used the same mark on his goods that the public might be deceived as to their source.

Any indefiniteness which the statute may have had in a literal reading, before the decisions of the state supreme

court in the instant case and in the *Seagram* case now pending before this Court, has been removed by those opinions. This Court has often stated the rule that when passing on the validity of state legislation it will consider the construction placed thereon by the highest court of the state, the same as though the definitions and applications given, were terms of the legislation itself. *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32, 34, 35. In advance of a construction of a state statute in regard to its application to any given situation it will not be assumed that a construction will be adopted or an application made which will render the statute unconstitutional. *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 186; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544, 545, 546; *Arizona Employers' Liability Cases,* 250 U. S. 400, 430.

On appeal from a state decision which has applied a statute in terms broad enough to cover applications which would be unconstitutional, where the state court, itself, has by its decision limited the statute and applied it in an entirely constitutional manner, the vagueness of language will not be considered for the purpose of holding the statute unconstitutional. *Smiley* v. *Kansas,* 196 U. S. 447, 455. All presumptions in favor of the constitutionality of a statute must be indulged in, and it must be assumed that the statute will be given an interpretation consistent with its spirit rather than with its mere literal letter, *Raschen* v. *Ward,* 279 U. S. 337, and that the history and circumstances of the adoption of the Act will govern its interpretation. *In re Martin,* 283 Fed. 833; *cf. Holy Trinity Church* v. *United States,* 143 U. S. 457; *Texas & Pac. Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197.

(d) The Illinois Fair Trade Act, as construed by the Illinois Supreme Court, does not delegate to any persons the power to regulate prices of commodities sold by others.

The contention of appellant that the Fair Trade Act delegates to any persons who choose to avail themselves of that delegation the power to regulate the prices of commodities sold by others, ignores the construction placed on the Act by the Illinois Supreme Court. The opinion of the court below construed the Act as merely permitting producers and distributors who had built up a good will around a trade-mark, brand or name, to restrict the use of the trade-mark, brand or name in a sale at a price below that stipulated by them. The state court expressly stated that the Act did not permit any one to place any restrictions on the price of commodities themselves, as such. It was pointed out that the only possible effect of the Act on the price of commodities would occur when the commodity became involved in an injury to the good will of a trade-mark owner or distributor by the sale of the commodity with the trade-mark, brand or name affixed thereto. The Act does, under the construction placed thereon, permit trade-mark owners or distributors who have built up a good will around the trade-mark, brand or name, to restrict the use which third persons may make of the trade-mark, brand or name. However, this does not involve a delegation of power over the property of third persons. The property in the good will belongs to the trade-mark owner, or his distributor, and third persons who buy commodities having affixed thereon a trade-mark, brand or name, which carries with it certain of the good will of the trade-mark owner or distributor do not thereby acquire a property interest in the good will which will permit them to use that good will in a manner injurious to the producer or distributor.

(e) The decision of the Illinois Supreme Court in the instant case does not deprive the appellant of his property without due process of law.

The appellant admitted the purchase of a quantity of "Old Quaker," which he seeks to sell at a cut price, from persons other than the appellee (Appellant's Brief pp. 8, 14, R. 14-15), subsequent to the time he knew that the appellee and the other distributors of "Old Quaker" had established a contractual system with their retailers to fix the retail price at which "Old Quaker" whiskey should be sold to the consumers (Appellant's Brief p. 7, R. 14-15). When the instant suit was instituted, the appellant was advertising for sale, offering for sale and selling this whiskey under the trade-mark and name of "Old Quaker" at a price approximately 20% below the uniform and standard price fixed in these contracts, which latter price was being generally observed by more than 85% of the retailers selling "Old Quaker" in Chicago (Appellant's Brief pages 6 to 7, 10, R. 13-14). For the purposes of this case it stands admitted that this conduct on the part of the appellant caused and threatened the appellee great loss and irreparable injury (Appellant's Brief p. 7, R. 13-14). The injunction obtained by the appellee merely enjoined the appellant from advertising for sale, offering to sell, or selling, at retail, in the City of Chicago, whiskey bearing the trade-mark and trade-name of "Old Quaker" at prices below the uniform retail price established in that city for that brand in contracts entered into by retailers of the brand with their respective vendors pursuant to the Fair Trade Act (Appellant's Brief p. 2, R. 26). The Supreme Court of Illinois stated in its opinion that this injunction left appellant free to sell the whiskey he owned at any price he pleased so long as he first removed the trade-mark "Old Quaker" there-

from (R. 55). It is this injunction under these circumstances, which appellant claims deprives him of his property without due process of law. Appellant's position upon analysis, is that he has a constitutional right to use and sell his whiskey under the trade-mark, brand and name of "Old Quaker" at any price he pleases.

The question raised is whether it is within the police power to provide against predatory price-cutting by permitting the owner of a good will built around a trade-mark, or his distributor, to restrain persons who, subsequent to the time that they know of steps taken by the owner or his distributor to maintain by contract a price to be observed in sales in which the mark or name is used, acquire property bearing that mark or name, from using the mark or name in a sale of the property at less than the owner or distributor's price, where no attempt is made to restrain the sale of the commodity at any price the owner pleases so long as he does not use the trade-mark or name in effectuating this sale? Stated otherwise, is it within the police power to protect a business which has grown up around a trade-mark, trade name or brand from the injury or destruction which price-cutting will occasion by the mere placing of a restraint upon the price-cutter's use of a trade-mark, name or brand without placing any restraint on his right to remove the mark and dispose of his property as he pleases?

None of the cases cited in appellant's brief in support of his position, discussed the question as thus stated, nor do they have any bearing on a decision of that question. The court below pointed out that all the appellant was urging he had the right to do was to "filch" the good will built up around the trade-mark "Old Quaker" (R. 53).

It is the very nature of a trade-mark that persons who purchase commodities bearing the trade-mark must, when they make use of the commodity without removing the mark, observe certain rights of those having a good will built upon the use of the trade-mark. Statutes extending the protection given the trade-mark owner by placing restrictions on the use of the mark by third persons who buy the property bearing the mark have always been held constitutional on this basis. Thus the New York Court of Appeals in the case of *People* v. *Luhrs*, 195 N. Y. 377, 89 N. E. 171, in sustaining such a statute said:

> "In buying a bottle with a trade-mark thereon, the producer does not acquire the right to use the trade-mark except to sell the original contents of the bottle."

This Court held in *Bourjois & Co.* v. *Katzel*, 260 U. S. 689, that a person who bought cosmetics bearing the trade-mark, brand and name of the producer did not have the right to sell those commodities under its marking where the producer had given another the exclusive license to use the trade-mark in the United States. In that case, this Court recognized the right of a trade-mark owner arbitrarily to deprive the owner of goods purchased from the trade-mark owner of the right to use the trade-mark, brand and name in making their resale in the United States by allowing the trade-mark owner to license another person to make the exclusive sales in this country. This Court there said (p. 692):

> "Ownership of the goods does not carry the right to sell them with a specific mark."

That the owner of goods bearing the trade-mark when he sells the trade-marked goods by the very nature of the trade-mark has an interest in the use to which the goods,

so long as they bear that mark, name and brand, are put, was expressed by one federal court which said:

> "In the very nature of the case, as it seems to me, the trade-mark must be something other than, and separate from, the merchandise," (*Davis* v. *Davis*, 27 Fed. 490, 492 (C. C. D. Mass.).

It is to be noted that the use which the appellant insists that he is unconditionally entitled to make of the trade-mark "Old Quaker" because he happens to own some whiskey which bears that mark and name, is a use which aside from the Illinois Fair Trade Act is regarded by many business men and economists as unfair competition.

Assuming that the Fair Trade Act empowers the producer or his distributor to determine, by making contracts with their respective retailers, the price at which nonconsenting retailers such as the appellant may sell commodities and not merely to restrict the use of the mark unrelated to the sale of the commodity itself, still the Act is constitutional and does not deprive appellant of his property without due process of law. The due process clause of the Fourteenth Amendment does not prevent a legislature from imposing limitations and restrictions on the freedom of an owner of property to sell his property at any price he may choose. *Nebbia* v. *New York*, 291 U. S. 502; *Central Lumber Company* v. *South Dakota*, 226 U. S. 157. Accordingly, the right of a property owner to fix a resale price for his own property is no greater than the right to determine any of the other features of a sale of goods.

In *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-operative Marketing Assn.*, 276 U. S. 71, it was held that the sale of property by warehousemen who knew that the person from whom he had purchased the property be-

longed to a co-operative marketing association, could be entirely prohibited.

In *Raschen* v. *Ward*, 279 U. S. 337, it was held that the owner of eye glasses and other optical supplies could be restrained by legislative enactment from selling his property unless an optician were present at the counter where the property was sold.

In *Lemieux* v. *Young*, 211 U. S. 489, it was held that the legislature could prohibit persons conducting stores from making a sale in bulk of all their assets without first giving notice to all their creditors.

In *Booth* v. *Illinois*, 184 U. S. 425 and *Brodnax* v. *Missouri*, 219 U. S. 285, it was held that a legislature could abolish entirely the right of a property owner to fix as a condition of his sale that the goods should be subject to future delivery.

It has heretofore been pointed out that the purposes of the Fair Trade Act are proper ends for the exercise of police power, pp. 58-64 *supra*, and that the means employed by the Fair Trade Act for the achievement of those purposes are appropriate, pp. 64-74, *supra*. The means do not operate arbitrarily and unreasonably in the restriction of appellant's rights. In the instant case he purchased the Old Quaker in question, with full knowledge that the owners of the good will in Old Quaker had adopted contracts with all their retailers, by which the retailers undertook not to resell Old Quaker at less than a fixed price. The admitted facts in the case show that this price was fair and reasonable; that the adoption of this price had led to greater purchases of the commodity by customers and that the margin between the wholesale price and the stipulated retail price yielded a fair profit to retailers. The only restriction which is being placed on the appellant's right

to use his property, is that he is not permitted to sell Old Quaker, at less than this price. This means that he is not prohibited from using the product for the ordinary purposes of retail at the prevailing market price. He is merely restrained from using the commodity as a "leader." He is not asked to sell the commodity at a price higher than customers will pay. The admitted facts in the case show that other retailers have no difficulty in securing sales at the stipulated price. The appellant is not being deprived of the right to make as large a profit as he desires on the commodity because the Act does not permit, and the appellee does not attempt to limit, the right of appellant to sell Old Quaker at as high a price as he chooses. The sale by the appellant at the cut-price will cause the appellee a great loss and injury through the destruction of its good will, will cause other retailers to breach their contracts with appellee and will also cause the public injury in the numerous ways heretofore enumerated. When such great evils will result from the appellant's conduct and the restrictions placed on that conduct in order to prevent the evils are as narrow and limited as those here involved, it cannot be said that the Fair Trade Act operates arbitrarily and unreasonably.

The exercise of police power always operates through the restraint on the conduct of some persons or the restriction of their property rights but such a restraint or restriction, when merely necessary to preserve property rights of other persons from destruction and when the legislature determines that those protected property rights are socially desirable, will be sustained by this Court, unless either the evils which the legislature supposed to exist could not reasonably have been found to exist or unless the means adopted to remedy those evils cannot be said to be reasonable means for achieving the purpose.

Much of appellant's argument proceeds on the supposition that persons may purchase property without knowledge of the existence of vertical resale price maintenance contracts and, later, before making a sale of the property discover their existence (Appellant's Brief p. 14). Whether or not the Act is applicable in such a situation has not been determined by the Illinois Supreme Court. The appellant in the case at bar did purchase his property with full knowledge of such a system. This Court will not, in advance of a construction by the Illinois Supreme Court on this point assume that the Illinois Supreme Court would hold the Act applicable in such a situation. *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 186; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544, 545, 546; *Arizona Employers' Liability Cases,* 250 U. S. 400, 430. And, even if the language of the statute is broad enough to cover such a situation, on an appeal from an application of the statute in an instance where the appellant purchased the property with full knowledge, the statute will not be held unconstitutional because of the possibility that it might be applied in a situation where it would be unconstitutional. *Smiley* v. *Kansas,* 196 U. S. 447, 455.

The appellant further argues that there are no restrictions placed on the price which a producer or his distributor may set as the resale price (Appellant's Brief p. 15). While the statute does not in terms impose a standard which producers or their distributors must conform to in fixing the price, a producer or distributor destroys his own business if the price established in the contracts is not a fair and reasonable price in the given market. The producer or his distributor is only permitted to stipulate a price by contract with retailers in instances where his goods compete fairly and openly in the market with other goods of the same kind. If the price should be higher than that

of other similar goods, consumers will not purchase and the producer's and distributors' businesses will be ruined; if lower, the Fair Trade Act in no wise restricts the appellant or any other retailer from selling it as high a price as he may desire.

That the statute by the very nature of its provisions will in practical operation only result in the establishment of a reasonable price actually determined by the competitive condition of the market itself, has been noted in many of the cases dealing with vertical resale price maintenance of trade-marked commodities, *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144, 148; *Ford Motor Co.* v. *Benj. E. Boone, Inc.*, 244 Fed. 335, 341 (C. C. A. 9th Cir.); *Cole Motor Co.* v. *Hurst*, 228 Fed. 280, 284 (C. C. A. 5th Cir.).

Further, the Act when applied only in situations where the retailer makes his purchase of the goods with full knowledge of the contractual system, can never result in undue or arbitrary deprivation of property. The Act by its terms merely operates when the goods in question are in fair and open competition with other goods. If the given retailer does not find the price fixed in the contractual system to his liking, he need not deal in that particular brand of goods at all but may deal entirely in other brands. This feature of the Act which in all instances will prevent it from acting arbitrarily and unreasonably to deprive any person of his property, was noted by the Illinois Supreme Court (R. 53). Also *Robert H. Ingersoll & Bro.* v. *H. Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030, 1032.

Further, if any person buys trade-marked goods and decides that the price is inconvenient the Act permits him to discontinue the line by selling at a cut-price after he has offered to resell the goods to the producer at his invoice price, Section 1.

CONCLUSION.

The General Assembly of the State of Illinois found an evil to exist within the borders of the State and made available a remedy. In its purpose, the statute which was enacted commends itself to the ethical standards of the business community and to the practical necessities of commerce. To carry out its purpose, the statute has touched the genius of the common law and there found a true means for operation. The *nisi prius* courts of the State have experienced no difficulty in applying the Act, and the State reviewing courts, both the Supreme and the Appellate, have already pointed the path. The record here is proof of the fairness and reasonableness of its provisions.

It is respectfully submitted that the decree of the Supreme Court of the State of Illinois be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 226, 372.—October Term, 1936.

Old Dearborn Distributing Company, Appellant,
226 *vs.*
Seagram-Distillers Corporation.

Carl W. McNeil, Doing Business as McNeil's Liquor Store, Appellant,
372 *vs.*
Joseph Triner Corporation.

Appeals from the Supreme Court of the State of Illinois.

[December 7, 1936.]

Mr. Justice Sutherland delivered the opinion of the Court.

These appeals bring here for decision the question of the constitutional validity of sections 1 and 2 of the Fair Trade Act of Illinois (Smith-Hurd Rev. Stat., 1935, c. 121-½, § 188 *et seq.*; Illinois State Bar Stat., 1935, c. 140, § 8 *et seq.*), providing as follows:

"Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

"(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

"Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

"(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: provided, however,

that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

"(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

"(3) By any officer acting under the orders of any court.

"Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

Section 3 of the act provides that it shall not apply to contracts or agreements between producers or between wholesalers or between retailers as to sale or resale prices.

No. 226 is a suit brought by appellee against appellant to enjoin the latter from wilfully and knowingly advertising, offering for sale or selling, certain brands of whisky at less than prices stipulated by appellee in accordance with contracts, made in pursuance of the Fair Trade Act, between appellee and distributors or retailers of such whisky. The facts set forth by the court below follow.

Appellee is a dealer in alcoholic beverages at wholesale. It buys the products here in question from the producers. The whiskies bear labels and trade-marks, and are in fair and open competition with commodities of the same general class produced by others. Appellant is a corporation operating four retail liquor stores in Chicago, and selling at both wholesale and retail. Appellee's sales in Chicago are made to wholesale distributors. It has not sold any of the whiskies in controversy to appellant, but has sold other liquors. Contracts in pursuance of the Fair Trade Act have been executed between appellee and certain distributors, and numerous Illinois retailers. Appellee does not sell directly to any retailer. Appellant sold the products in question at cut prices—that is to say, at prices below those stipulated—and continued to do so after appellee's demand that it cease such practice. The result of such price cutting was a diminution of sales during the price-cutting period suffered by appellee and retailers other than appellant. Some dealers ceased to display the products, and notified appellee that they could not compete with appellant and would discontinue handling the products unless the price cutting was stopped. Ap-

pellant was also a party to breaches of other fair-trade contracts between appellee and certain distributors, and continued the price cutting throughout the trial of the case in the Illinois state court of first instance.

The record shows that one of the retailer's contracts drawn in pursuance of the act was signed by appellant's secretary and treasurer prior to the commission of the acts complained of. This contract, among other things provided that the product in question should not be sold, advertised or offered for sale in Illinois below the prices to be stipulated by appellee. The contract was assailed by appellant below as ineffective, and for present purposes we accept that view. It is plain enough, however, that appellant had knowledge of the original contractual restrictions and that they constituted conditions upon which sales thereafter were to be made.

No. 372 is a suit of the same character as No. 226, seeking the same relief by injunction. The facts set forth in the complaint were admitted by a motion to dismiss. These facts, fully stated in the opinion of the court below, *infra*, we find it unnecessary to repeat. It is enough to say that while they differ in detail from those appearing in No. 226, they are sufficiently the same in substance as to be controlled by the same principles of law.

Both appellants attack the validity of the act upon the grounds that it denies due process of law and the equal protection of the laws in violation of the Fourteenth Amendment in the particulars which hereafter appear. The state courts of first instance in which the suits were brought sustained the validity of the act and entered decrees as prayed for in the bills of complaint. These decrees were affirmed upon appeal by the court below. 363 Ill. 559, 611.

The Illinois statute constitutes a legislative recognition of a rule which had been accepted by many of the state courts as valid at common law. This rule was based upon the distinction found to exist between articles of trade put out by the manufacturer or producer under and identified by patent, copyright, trade-mark, brand, or similar device and articles of like character put out by others and not so identified. The same rule was followed for a time by some of the lower federal courts; but their decisions were upset by this court in a series of cases, of which *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373 is an example. In that case this court held that a system of contracts between manufacturers and wholesale and retail merchants which sought to

control the prices for sales by all such dealers by fixing the amount which the consumer should pay, amounted to an unlawful restraint of trade, invalid at common law and, so far as interstate commerce was affected, invalid under the Sherman Anti-trust Act of July 2, 1890; and it was held that the rule applied to such agreements notwithstanding the fact that they related to proprietary medicines made under a secret process and identified by distinctive packages, labels and trade-marks. The argument that since the manufacturer might make and sell or not as he chose, he could lawfully condition the price at which subsequent sales could be made by the purchaser, was rejected.

"If there be an advantage to a manufacturer in the maintenance of fixed retail prices," this court said at pages 407-409, "the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system. . . . The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question. It is not entitled to special privilege or immunity. It is an article of commerce and the rules concerning the freedom of trade must be held to apply to it. . . . The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

It is unnecessary to review the contrary state decisions. It is enough, for present purposes, to say that, generally speaking, they sustained contracts standardizing the price at which "identified" commodities subsequently might be sold, where the price standardization is primarily effected to protect the good will created or enlarged by the identifying mark or brand. Where a manufacturer puts out an article of general production identified by a special

trade-mark or brand, the result of an agreement fixing the subsequent sales price affects competition between the identified articles alone, leaving competition between articles so identified by a given manufacturer and all other articles of like kind to have full play. In other words, such restraint upon competition as there may be is strictly limited to that portion of the entire product put out and plainly identified by a particular manufacturer or producer.

The ground upon which the opposing view of this court proceeds is that such an agreement, nevertheless, constitutes an unlawful restraint of trade at common law and, in respect of interstate commerce, a violation of the Sherman Anti-trust Act. A careful reading of the decisions discloses no other ground.

Following these decisions, bills were introduced in Congress from time to time authorizing standardization of price agreements in respect of identified goods, upon which extensive hearings were held by the appropriate Congressional committees. These bills are in all essential respects like the Illinois act. The hearings disclose exhaustive legal briefs, and testimony and arguments for and against the economic value of the proposed laws. See, for example, Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, on H. R. 13305 (63d Cong., 2d and 3d Sess.); H. R. 13568 (64th Cong., 1st and 2d Sess.); compare Report of the Federal Trade Commission on Resale Price Maintenance, 70th Cong., 2d Sess., H. Doc. No. 546.

It is not without significance that while the proposed legislation was vigorously assailed in other respects, we do not find that any constitutional objection was urged. And the decisions of this court, far from suggesting any constitutional infirmity in such proposed legislation, contain implications to the contrary. In the *Dr. Miles Medical Co.* case (p. 405), the court said, "Nor can the manufacturer by rule and notice, *in the absence of contract or statutory* right, even though the restriction be known to purchasers, fix prices for future sales." (Italics supplied.) In *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8, where this court struck down a stipulation that patented articles should not be resold at prices other than those fixed presently and from time to time by the patent owner, it was suggested (p. 26) that if this view resulted in damage to the holders of patent rights or the law afforded insufficient protection to the inventor, the remedy lay within the

scope of legislative (that is to say, Congressional) action. And in a concurring opinion (p. 28), it was said, "If the rule so declared is believed to be harmful in its operation, the remedy may be found, as it has been sought, through application to the Congress . . ." The words "as it has been sought" quite evidently referred to the bills of which we have just spoken, since they had theretofore been introduced and made the subject of the hearings. See, also, *Bauer* v. *O'Donnell*, 229 U. S. 1, 12. While these observations of the court cannot, of course, be regarded as decisive of the question, they plainly imply that the court at the time foresaw no valid constitutional objection to such legislation, for it cannot be supposed that the court would suggest a legislative remedy the validity of which might seem open to doubt.

In the light of the foregoing brief résumé of the question with respect to the standardization of selling prices of identified goods in the absence of statutory authority, we proceed to a consideration of the specific objections to the constitutionality of the act here under review.

First. In respect of the due process of law clause, it is contended that the statute is a price-fixing law, which has the effect of denying to the owner of property the right to determine for himself the price at which he will sell. Appellants invoke the well-settled general principle that the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth and Fourteenth Amendments. *Tyson & Brother* v. *Banton*, 273 U. S. 418, 429; *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, 537; *Ribnik* v. *McBride*, 277 U. S. 350; *Williams* v. *Standard Oil Co.*, 278 U. S. 235; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262. These cases hold that, with certain exceptions, which need not now be set forth, this right of the owner cannot be denied by legislative enactment fixing prices and compelling such owner to adhere to them. But the decisions referred to deal only with legislative price fixing. They constitute no authority for holding that prices in respect of "identified" goods may not be fixed under legislative leave by contract between the parties. The Illinois Fair Trade Act does not infringe the doctrine of these cases.

Section 1 affirms the validity of contracts of sale or resale of commodities identified by the trade-mark, brand or name of the

producer or owner, which are in fair and open competition with commodities of the same general class produced by others, notwithstanding that such contracts stipulate (1) that the buyer will not resell except at the price stipulated by the vendor; and (2) that the producer or vendee of such a commodity shall require, upon the sale to another, that he agree in turn not to resell except at the price stipulated by such producer or vendee. It is clear that this section does not attempt to fix prices, nor does it delegate such power to private persons. It *permits* the designated private persons to contract with respect thereto. It contains no element of compulsion but simply legalizes their acts, leaving them free to enter into the authorized contract or not as they may see fit. Thus far, the act plainly is not open to objection; and none seems to be made.

The challenge is directed against section 2, which provides that wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract made under section 1, whether the person doing so is or is not a party to the contract, shall constitute unfair competition, giving rise to a right of action in favor of anyone damaged thereby.

It is first to be observed that § 2 reaches not the *mere* advertising, offering for sale or selling at less than the stipulated price, but the doing of any of these things *wilfully* and *knowingly*. We are not called upon to determine the case of one who has made his purchase in ignorance of the contractual restriction upon the selling price, but of a purchaser who has had definite information respecting such contractual restriction and who, with such knowledge, nevertheless proceeds wilfully to resell in disregard of it.

In the second place, § 2 does not deal with the restriction upon the sale of the commodity *qua* commodity, but with that restriction because the commodity is identified by the trade-mark, brand or name of the producer or owner. The essence of the statutory violation then consists not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand or name in accomplishing such disposition. The primary aim of the law is to protect the property — namely, the good will — of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself.

Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under § 2 of the law by which such acquisition was conditioned. Cf. *Provident Institution* v. *Jersey City,* 113 U. S. 506, 514-515; *Vreeland* v. *O'Neil,* 36 N. J. Eq. 399, 402; same case on appeal, 37 N. J. Eq. 574, 577.

We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others, such as was condemned in *Eubank* v. *Richmond,* 226 U. S. 137, 143; *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116, 121-122; and *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 311. In those cases the property affected had been acquired without any preexisting restriction in respect of its use or disposition. The imposition of the restriction *in invitum* was authorized after complete and unrestricted ownership had vested in the persons affected. Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it.

Nor is § 2 so arbitrary, unfair or wanting in reason as to result in a denial of due process. We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trade-mark stands. Appellants own the commodity; they do not own the mark or the good will that the mark symbolizes. And good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade-marks, labels and brands, are legitimate aids to the creation or enlargement of such good will. It is well settled that the proprietor of the good will "is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority.",

McLean v. *Fleming*, 96 U. S. 245, 252. "Courts afford redress or relief upon the ground that a party has a valuable interest in the good-will of his trade or business, and in the trade-marks adopted to maintain and extend it." *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 412. The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Sec. 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates "unfair competition." See *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Assn.*, 276 U. S. 71, 91-92, 96-97. There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end.

There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned. Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the legislature. *Radice* v. *New York*, 264 U. S. 292, 294; *Zahn* v. *Board of Public Works*, 274 U. S. 325, 328, and cases cited.

Certain terms contained in the act are said to be fatally vague and indefinite, and therefore to deny due process of law under our

decisions in *Connally* v. *General Const. Co.*, 269 U. S. 385, 390 *et seq.*, and other cases. The contention is directed in the main against the phrase in § 1 of the act, "fair and open competition", and "any commodity" and "any contract entered into pursuant to the provisions of section 1" contained in § 2. The point is shown to be lacking in substance by the reasoning in the *Connally* case at pp. 391-392 and the cases there cited. See particularly *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 501-503; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 92, where it is said "that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." Certainly, the phrase "fair and open competition" is as definite as the phrase contained in § 5 of the Federal Trade Commission Act, "unfair *methods* of competition", which this court has never regarded as being fatally uncertain. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427; *Federal Trade Commission* v. *Beech-Nut Co.*, 257 U. S. 441, 453; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 648. We think the phrases complained of are sufficiently definite, considering the whole statute; and that no one need be misled as to their meaning, or need suffer by reason of any supposed uncertainty. Cf. *Miller* v. *Schoene*, 276 U. S. 272, 281; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 69.

Second. The contention that § 2 of the act denies the equal protection of the laws in violation of the Fourteenth Amendment proceeds upon the view that it confers a privilege upon the producers and owners of goods identified by trade-mark, brand or name, which it denies in the case of unidentified goods. As this court many times has said, the equal-protection clause does not preclude the states from resorting to classification for the purposes of legislation. It only requires that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Colgate* v. *Harvey*, 296 U. S. 404, 422, 423, and cases cited.

Clearly, the challenged section of the Illinois act satisfies this test. Enough appears already in this opinion to show the essential difference between trade-marked goods and others not so identified. The entire struggle to bring about legislation such as the Illinois

act embodies has been based upon this essential difference. In *Radice* v. *New York*, 264 U. S. 292, 296-297, we sustained a statute prohibiting night employment of women in restaurants in large cities, against the claim that it denied equal protection of the laws in that it did not apply to small cities, or to women employed as singers and performers, or to attendants in ladies' cloak rooms and parlors, or employees in hotel dining rooms and kitchens or in lunch rooms and restaurants conducted by employers for the benefit of their employees. Former decisions of the court were cited sustaining classifications based upon differences between fire insurance and other kinds of insurance; between railroads and other corporations; between barber-shop employment and other kinds of labor; between "immigrant agents" engaged in hiring laborers to be employed beyond the limits of a state and persons engaged in the business of hiring for labor within the state; between sugar refiners who produce the sugar and those who purchase it. Other illustrations of a similar character might be cited.

But it is unnecessary to pursue the subject further; for, since the sole purpose of the present law is to afford a legitimate remedy for an injury to the good will which results from the use of trademarks, brands or names, it is obvious that its provisions would be wholly inapplicable to goods which are unmarked.

Decrees affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.